81-2149

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

NORMAN STUMES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WHEN DOES A CONVERSATION BEGIN AND END?

2. SHOULD AN APPELLATE COURT BE PERMITTED TO FIND FACTS WITHOUT FIRST ALLOWING THE STATE COURT OR FEDERAL DISTRICT COURT TO FIND THE FACTS?

3. SHOULD EDWARDS V. ARIZONA BE APPLIED RETROACTIVELY?

STATEMENT OF QUESTION

Mr. Stumes got into a police car with three officers at 9:00 a.m. in Green Bay, Wisconsin. Miranda rights were given to him at that time. For fifteen or twenty minutes the death of Joyce Hoff was discussed with the prisoner Stumes. He was not under arrest for the death of Hoff at that time. Two hundred and fifty miles out of Green Bay a lunch stop was made. Two hundred and sixty miles later after some 10 or 15 minutes of silence the prisoner Stumes confessed to the crime of killing

Joyce Hoff. Stumes testified that there was no interrogation after lunch. Mr. Stumes had previously been advised by his attorney not to talk to the officers. On the previous day interrogation had ceased when Mr. Stumes had stated he wanted to talk to his attorney before answering any more questions. Did Mr. Stumes knowingly, intelligently and voluntarily waive his right to counsel in the car, when on the previous day he nad requested to speak to counsel before talking to the police officers about the crime? The Eighth Circuit found as a fact that the conversation which started in the morning when the officers read to Stumes his Miranda rights continued the entire day. They found as a fact that Stumes did not initiate the conversation at the time of his confession. On this fact the state courts of South Dakota have never been given an opportunity to rule, and neither was the federal district court. The Eighth Circuit applied Edwards v. Arizona, 451

U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) without any comment or application of the criteria by which the retroactive issues are to be applied.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
STATEMENT OF QUESTION	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	4
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT	15
CONCLUSION	23
CERTIFICATE OF SERVICE	24
APPENDIX	

TABLE OF AUTHORITIES

PAGE

CASES

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) PASSIM

Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758 (1964) 20, 21

Johnson v. New Jersey, 384 U.S. 723, 86 S.Ct. 1772, 1778 (1966) 18, 19

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) 18

Miranda v. Arizona, 384 U.S. 436 86 S.Ct. 1602 (1966) 5, 18

State v. Blakney, 605 P.2d 1093 (Mont. 1980)(100 S.Ct. 3000 (1981) 22

State v. Shea, 30 Cr.L. 2411 (Decided January 25, 1982) 22

State v. Stumes, 90 S.D. 382, 241 N.W.2d 587 (S.D. 1976) 1, 2, 12

Stumes v. Solem, 511 F.Supp 1312, 1316, 1317, 1319, 1324 (D.S.D. 1981) PASSIM

Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966) 18

OTHER REFERENCES

Anderson Full, 30 Cr.L 4256, 4258	17
28 U.S.C. 1254	2
28 U.S.C. § 2254(d)(3)	14
Rules of the Supreme Court No. 20 (1980)	2

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OPINIONS BELOW

The opinion of the Supreme Court of South Dakota is found at State v. Stumes, 241 N.W.2d

587 (S.D. 1976). The opinion of the federal district court on the Writ of Habeas Corpus is found at State v. Stumes, 511 F.Supp. 1312 (D.S.D. 1981). The opinion of the Eighth Circuit Court of Appeals of March 1, 1981, is attached to this Writ in the Appendix.

JURISDICTIONAL STATEMENT

On March 1, 1982, the Eighth Circuit Court of Appeals in St. Louis granted to Respondent his Petition for Writ of Habeas Corpus. A rehearing on the matter was requested and denied on March 31, 1982. The mandate of the Court was issued on April 23, 1982. A hearing on a Motion for Stay pending this Petition for a Writ of Certiorari is set for May 10, 1982, at 10:00 a.m. before the Honorable Fred J. Nichol, Senior Judge, United States District Court, Sioux Falls, South Dakota. This Court's jurisdiction is involved under 28 U.S.C. 1254 and Rules of the Supreme Court No. 20 (1980).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 17, 1973, the body of Joyce Hoff was discovered in her apartment in Sioux Falls, South Dakota, the apparent victim of a homicide. During the investigation of the crime by Sioux Falls, police, Stumes became one of several suspects. At the time he had pending against him several unrelated charges. Stumes was represented on one of the charges by Steve Jorgensen, a Sioux Falls attorney who had previously represented him on other matters. Stumes's mother, upon learning that Stumes was being sought by police in connection with the homicide, contacted Jorgensen and retained him to represent her son. Stumes had not yet been formally charged with homicide in the death of Joyce Hoff.

After being retained by Stumes's mother, Jorgenson subsequently contacted Don Skadsen, Chief of Detectives with the Sioux Falls police, to tell him that he knew the police were looking for

Stumes. According to Jorgensen's testimony at the evidentiary hearing in the District Court, he then struck a deal with the police under which, if Stumes contacted him first, he would persuade Stumes to surrender to police and, in turn, if the police found Stumes first, they would contact Jorgensen and permit him to talk to Stumes before they questioned him. Jorgensen stated that, as far as he was concerned, the police fulfulled their obligation under the agreement.

On September 27, 1973, Stumes was arrested in Green Bay, Wisconsin, on charges unrelated to the Hoff homicide. He was informed of his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966), and placed in the Brown County Jail in Wisconsin to await transportation back to Sioux Falls. Jorgensen, his attorney, was subsequently notified of Stumes's arrest by Detective Skadsen. The morning after his arrest, Stumes telephoned Jorgensen who told him not to make any statements to police until he had returned to Sioux

Falls and discussed the matter with Jorgensen. Later that week, Jorgensen encountered Sergeant James Green of the Sioux Falls police outside police department headquarters. Jorgensen informed Green that he had advised Stumes not to talk to police but then added that, knowing Green, he would have a confession out of Stumes before he got him back to Sioux Falls.

On September 30, 1973, police officers Skadsen and Green flew to Green Bay to bring Stumes back to Sioux Falls in order to stand trial on the other charges as well as for questioning in the Hoff homicide. That same day, Minnehaha County Deputy Sheriff Hendrick drove to Green Bay in a sheriff's automobile to be used in transporting Stumes to Sioux Falls.

On the morning of October 1, 1973, after executing a consent form for the search of his car and residence, Stumes was moved from the Brown County Jail to the Green Bay Police Department for questioning. While other police

officers searched Stumes's car and room, Sergeant Green remained behind to question Stumes. After being advised of his rights at approximately 10:00 a.m., Stumes stated that he understood his rights and that he had no objection to speaking to police without the presence of his attorney. Green then proceeded over the course of an hour and a half to question Stumes about the death of Joyce Hoff. Stumes, however, made no statements implicating himself in the homicide. A short time later, Stumes was asked by Green if he would submit to a polygraph examination on the Hoff case. Stumes stated that he would rather not answer until he talked to his lawyer, Steve Jorgensen. Green stopped his questioning at this point, but told Stumes that officers would visit him again in the afternoon. Stumes was then returned to the county jail at approximately 11:45 a.m.

Detectives Skadsen and Green revisited Stumes at about 4:30 p.m. No Miranda warning was given. Stumes was asked about certain

discovered evidence that placed him in Joyce Hoff's apartment on the day of her death. Stumes admitted being in the decedent's apartment on September 17, and having intercourse with her at that time. He denied any responsibility for her death. After about half an hour of questioning, Green asked Stumes if Joyce Hoff's death was intentional or accidental. Green and Skadsen testified that Stumes responded by saying it was accidental. Petitioner then stated, "I would rather not talk about it any more at this time until I talk to my attorney, and after that I'll give you a full statement in regards to her death." 511 F. Supp. at 1316. The questioning immediately ended.

Around 9:00 a.m. the next morning Stumes was taken from the county jail by Skadsen, Green, and Deputy Sheriff Hendrick and placed in the sheriff's automobile for the trip back to Sioux Falls. Shortly after the trip began, Stumes was informed of his Miranda rights and asked

whether he understood them. Upon indicating his comprehension, Stumes was then asked by the police officers if he was willing to talk to them. Stumes, according to the testimony of Skadsen and Green, shrugged his shoulders and nodded his head forward. He was then questioned about the death of Joyce Hoff. The discussion of the case did not go beyond questions previously asked of Stumes the day before at the county jail and lasted only fifteen or twenty minutes on that occasion.

It is 600 miles from Green Bay to Sioux Falls, and the trip took from 9:00 a.m. to about 6:45 p.m. In addition to the questioning that took place at the beginning of the trip, there was "intermittent questioning" about the Hoff homicide "during [the] time period" of the trip. TR 85.

Respondent Stumes classified the discussion in the car as follows: 511 F.Supp. 1316

> Q: Do you recall any interrogation that morning?

A: Not directly interrogation. There were some statements made.

During the trip back to Sioux Falls several stops were made including two or three stops for gas and refreshments and about 250 miles from Green Bay a stop for lunch. After lunch Skadsen and Green changed places.

After eating and resuming the trip Respondent classified the discussions that took place as follows: 511 F.Supp. 1316

Q: Do you recall any interrogation after you had eaten?

A: No, I don't think there was any interrogation right after we ate. There was a general conversation.

Then, according to Skadsen and Green's testimony approximately 90 miles from Sioux Falls, Respondent started crying and said, "taking a human life is so useless." This is confirmed by Respondent who described the scene this way: "Somewhere between Jackson and Worthington . . . I had a little conflict with my emotions and I made the statement that I couldn't understand

why anybody would want to kill Joyce and that the taking of a human life is so useless." Stumes was then asked and testified as follows: 511 F.Supp. 1316

> Q: Do you recall, was there any interrogation going on at that time. . . .?
>
> A: No, I don't believe so. There hadn't--I don't think there was any conversation in the car for maybe 10 or 15 minutes.

Green then told Respondent he would feel much better if he "got it off his chest." Stumes then stated that he'd been wanting to tell somebody, but he just didn't know how to go about it. Then, according to Skadsen and Green's testimony, Stumes related how he had killed Joyce Hoff on September 17, 1973.[1]

After Stumes had given his account of how Joyce Hoff died that night, Green asked him if he

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[1] For a recitation of Petitioner's statement as testified to by Sergeant Green, see 511 F.Supp. 1316-17.

would be willing to give a statement to the police when they arrived in Sioux Falls. Stumes agreed. At that point, according to Skadsen and Green, the following colloquy occurred:

> Q. Your attorney will undoubtedly advise you not to give one (statement).
>
> A. I don't give a damn what he says. I'm doing anything I feel like, and I'll talk to anybody I want to.

511 F. Supp. at 1317. Skadsen and Green testified that was the first time during the day that Stumes had mentioned his attorney.

Stumes and the police officers arrived at the Minnehaha County Jail in Sioux Falls around 6:45 p.m. A short time after Stumes was placed in his cell. He notified the jailer that he wanted to talk to Detective Skadsen. According to Skadsen, when he got to Stumes's cell, Stumes was sobbing. He then put his head on Skadsen's shoulder and said, "please tell them that I didn't mean to kill her, that it was an accident--that I'm not a vicious killer." Ibid.

Stumes was subsequently charged with the murder of Joyce Hoff. Represented by appointed counsel, Stumes filed a motion to suppress all of the admissions on the ground that his constitutional rights had been violated. After a hearing, the motion was denied. A jury later convicted Stumes of first-degree manslaughter and sentenced him to life imprisonment in the South Dakota State Penitentiary.

Stumes appealed his conviction to the South Dakota Supreme Court, which remanded the case for findings of fact and conclusions of law on the suppression issue. (The trial court had simply denied the motion to suppress from the bench, without making findings for the Supreme Court to review.) State v. Stumes, 90 S.D. 382, 241 N.W.2d 587 (1976). The trial court was given the authority to make the determination whether Stumes's admissions were voluntary. On remand, the court so found, and Stumes's conviction was "automatically affirmed." 511 F.Supp. at 1318.

Under this procedure, Stumes never got an appellate review in the state courts of the findings relevant to the suppression issue.

Stumes sought a writ of habeas corpus in the District Court based on claims that had been previously raised and decided by the state courts. After holding evidentiary hearings and allowing the submission of additional evidence, the court found that "Petitioner ha[d] established, pursuant to 28 U.S.C. § 2254(d)(3), by convincing evidence . . . that material facts were not adequately developed at the state court hearing and the presumption of correctness does not apply." Stumes v. Solem, 511 F.Supp. 1312, 1319 (D.S.D. 1981) The State vigorously objected to an evidentiary hearing.

The federal district court denied the writ on April 10, 1981. Edwards v. Arizona, supra was decided on May 18, 1981. The Eighth Circuit reversed the district court based on Edwards. The appellate court made a finding of fact as to

who initiated the conversation in the car when after a period of silence, Respondent Stumes confessed.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The federal court of appeals has decided an important federal question without first giving the state court the opportunity to rule on the issue.

2. The federal court of appeals has decided an important question of federal law which has not been but should be, settled by this Court and has done so in a manner which conflicts with applicable decisions of this Court.

3. A state court of last resort has decided this federal question in a way in conflict with the decision of a federal court of appeals.

Is the conversation that you had with your spouse this morning, the same conversation that you had with her in the evening? If you said

hello first to a friend when you meet him ten years ago, can he never "initiate" a conversation with you? The court of appeals in this case held that after a period of 10 to 15 minutes of silence, and an entire afternoon of no interrogation, but just general conversation, that the prisoner Stumes did NOT initiate a conversation. The court of appeals has read Edwards v. Arizona, supra, as creating a new rule, which requires a threshold inquiry in each case as to precisely who opened any conversation between an accused and the police officers. As Justice Powell and Rehnquist noted in Edwards at 101 S.Ct. 1888: "For example, police do not impermissibly 'initiate' renewed interrogation by engaging in routine conversations with suspects about unrelated matters." The question of the "fact" that Stumes did knowingly, intelligently and voluntarily waive his right to counsel was ruled on by the state courts of South Dakota and the federal district court.

The state court of South Dakota, after a remand from the South Dakota Supreme Court found that Stumes had voluntarily, knowingly and intelligently waived his right to be silent and to counsel. The federal district court found that Stumes had voluntarily, knowingly and intelligently waived his right to counsel. 511 F.Supp. at 1324. After Edwards, the fact of who initiated the conversation became the point on which the entire case turned, yet the state courts of South Dakota were denied the opportunity to rule on this fact. " . . . whether the suspect now desires to talk to police without counsel--is a question of fact to be determined in light of all of the circumstances." Edwards v. Arizona, 101 S.Ct. 1888.

As stated by Justices Burger and O'Connor in dissenting from the holding in Anderson Full, 30 Cr.L. 4256, 4258:

> Put simply--and bluntly, as this case demands--the federal judges who set aside this state court judgment acted like jurors, not jurists.

2. In addition to applying Edwards in a manner which South Dakota does not think that this court intended, the federal court of appeals decided an important question of federal law which has not yet been ruled on by this Court. Does Edwards v. Arizona apply retroactively?

Edwards v. Arizona was decided eight years after Stumes had a trial in the State of South Dakota. Edwards was an expansion of the Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). In a subsequent decision the Supreme Court refused to apply Miranda retroactively, Johnson v. New Jersey, 384 U.S. 723, 86 S.Ct. 1772 (1966). The Court pointed out that Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); and Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966) established the principle that in criminal litigation concerning constitutional claims, the Court may in the interest of justice make rules declared by them

prospective where the exigencies of the situation require such an application. These cases also delineated the criteria by which retroactive issues may be resolved. The Court set three standards: (1) the court must look to the purpose of the new standards governing police interrogation, (2) the reliance which may have been placed upon prior decisions on the subject, and (3) the effect on the administration of justice of a retroactive application of Escobedo and Miranda. It is submitted by the State of South Dakota that in the opinion rendered in this case involving Stume that the Eighth Circuit did not consider these standards before applying Edwards v. Arizona retroactively.

If the rule affected "the very integrity of the fact-finding process" and averted "the clear danger of convicting the innocent" then retroactive application was justified. Johnson v. New Jersey, supra at 1778. However, it is the position of the State of South Dakota that the

application of Edwards does not affect the integrity of the fact-finding process to the degree that Edwards must be applied retroactively. The Miranda rule was designed to guarantee the full protection of the privilege against self-incrimination and a defendant could respond to interrogation while in custody with an intelligent understanding of his right to remain silent. The danger of guarding against an unreliable statement in every instance of in-custody interrogation is not as great as when the accused is subjected to overt and obvious coercion and that is why the court refused to retroactively apply Escobedo and Miranda. This is why this Court should not retroactively apply Edwards.

Under the second criteria this ruling by the court in Edwards was not one which was "clearly forshadowed" and therfore should not be applied to law enforcement agencies which followed the dictates of the court in Miranda but had no warning that they would be prohibited from

asking a suspect, who had been warned of his Miranda rights and refused to give any information without counsel, whether he had changed his mind and was willing to be interrogated without a lawyer. Edwards was totally unexpected and until its publication, law enforcement officers could reasonably rely on prior cases that a suspect could voluntarily wiave his rights to counsel.

This unexpected ruling in Edwards, leads into the third criteria in non-application of the Edwards retroactively, in that it would seriously disrupt the administration of our criminal laws. "It will require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." 86 S.Ct. 1780, 384 U.S. 731.

The United States Supreme Court refused to apply its holding in Miranda retroactively for even two years back to the Escobedo decision. The court was unable to find that Miranda had not been fully anticipated. Therefore, Edwards

should not be applied retroactively. If Edwards could have been anticipated, the state court or even the federal district court could have made a finding of fact on whether or not the conversation in the car which led to the confession of Stumes was initiated by Stumes or by law enforcement. In shepardizing Edwards v. Arizona, no federal court has ruled on whether Edwards applies retroactively. (See State v. Blakney, 605 P.2d 1093 (Mont. 1980)(101 S.Ct. 3000 (1981) where the Supreme Court vacated the Montana court ruling in light of Edwards.)

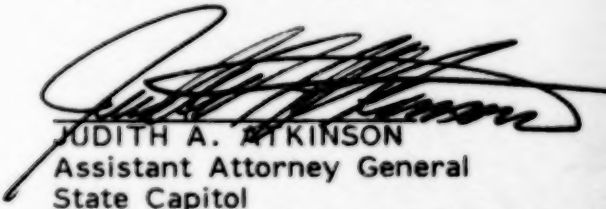
3. A state court of last resort has decided this federal question in direct opposition to the Eighth Circuit Court of Appeals.

In State v. Shea, 30 Cr.L. 2411 (decided January 25, 1982) the Supreme Court of Louisiana has held that Edwards v. Arizona does not apply retroactively.

CONCLUSION

Based on the foregoing arguments and authorities, the State of South Dakota prays that its Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals be granted.

Respectfully submitted,



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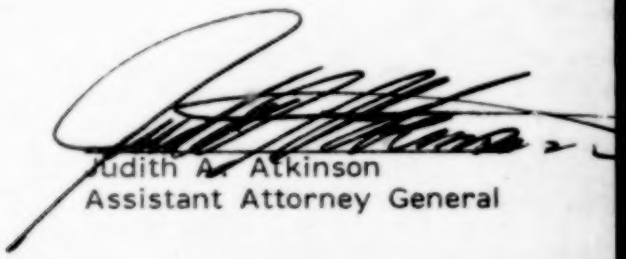
CERTIFICATE OF SERVICE

I hereby certify that three copies of the Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals in the case of Norman Stumes v. Herman Solem, was served by United States mail, first class, postage prepaid upon Mr. Timothy J. McGreevy, Dana, Golden, Moore & Rasmussen, 131 North Main Avenue, Sioux Falls, South Dakota, 57102 on this 30th day of April, 1982.



Judith A. Atkinson
Assistant Attorney General

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 81-1589

Norman Stumes, *

Appellant, * Appeal from the United States District Court for the District of South Dakota.

v. *

Herman Solem, *

Appellee. *

Submitted: November 12, 1981

Filed: March 1, 1982

Before HENLEY and ARNOLD, Circuit Judges, and HARRIS,* Senior District Judge.

ARNOLD, Circuit Judge.

Petitioner Norman Stumes appeals the decision of the District Court denying his petition for a writ of habeas corpus. Because the recent ruling of the Supreme Court in Edwards v. Arizona, 101 S. Ct. 1880 (1981), requires a different result, we reverse.

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* The Hon. Oren Harris, Senior United States District Judge for the Eastern and Western Districts of Arkansas, sitting by designation.

We summarize the relevant facts of the case as detailed by the District Court in its opinion, reported at 511 F. Supp. 1312. There is little or no disagreement as to what happened.

On September 17, 1973, the body of Joyce Hoff was discovered in her apartment in Sioux Falls, South Dakota, the apparent victim of a homicide. During the investigation of the crime by Sioux Falls police, the petitioner became one of several suspects. At the time he had pending against him several unrelated charges. Petitioner was represented on one of the charges by Steve Jorgensen, a Sioux Falls attorney who had previously represented him on other matters. Petitioner's mother, upon learning that petitioner was being sought by police in connection with the homicide, contacted Jorgensen and retained him to represent her son.[1] Petitioner had not yet been formally charged with homicide in the death of Joyce Hoff.

After being retained by petitioner's mother, Jorgensen subsequently contacted Don Skadsen, Chief of Detectives with the Sioux Falls police, to tell him that he knew the police were looking for petitioner. According to Jorgensen's testimony at the evidentiary hearing in the District Court, he then struck a deal with the police under which, if petitioner contacted him first, he would persuade petitioner to surrender to police and, in turn, if the police found petitioner first, they would contact Jorgensen and permit him to talk to petitioner before they questioned him. Jorgensen

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[1] In retaining Steve Jorgensen to represent petitioner, petitioner's mother paid Jorgensen the sum of $500.00.

stated that, as far as he was concerned, the police fulfilled their obligation under the agreement.

On September 27, 1973, petitioner was arrested in Green Bay, Wisconsin, on charges unrelated to the Hoff homicide. He was informed of his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966), and placed in the Brown County Jail in Wisconsin to await transportation back to Sioux Falls. Jorgensen, his attorney, was subsequently notified of petitioner's arrest by Detective Skadsen. The morning after his arrest, petitioner telephoned Jorgensen, who told him not to make any statements to police until he had returned to Sioux Falls and discussed the matter with Jorgensen. Later that week, Jorgensen encountered Sergeant James Green of the Sioux Falls police outside police department headquarters. Jorgensen informed Green that he had advised petitioner not to talk to the police but then added that, knowing Green, he would have a confession out of petitioner before he got him back to Sioux Falls.[2]

On September 30, 1973, police officers Skadsen and Green flew to Green Bay to bring petitioner back to Sioux Falls in order to stand trial on the other charges as well as for questioning in the Hoff homicide. That same day, Minnehaha County Deputy Sheriff Hendrick drove to Green Bay in a sheriff's automobile to be used in transporting petitioner to Sioux Falls.

---

[2] During testimony at the evidentiary hearing before the habeas court, Jorgensen stated that his remark to Green was not "in a serious vein." Transcript of October 6, 1977, p. 13 (hereinafter cited as Tr.) Green testified in the suppression hearing prior to petitioner's trial in the state court that Jorgensen had told him that "he'd talked to [petitioner] on the telephone . . . and had advised him not to talk to us but he stated that if he did talk to us there wasn't anything he could do about it." 511 F. Supp. at 1315.

On the morning of October 1, 1973, after executing a consent form for the search of his car and residence, petitioner was moved from the Brown County Jail to the Green Bay Police Department for questioning. While other police officers searched petitioner's car and room, Sergeant Green remained behind to question petitioner. After being advised of his rights at approximately 10:00 a.m., petitioner stated that he understood his rights and that he had no objection to speaking to police without the presence of his attorney. Green then proceeded over the course of an hour and a half to question petitioner about the death of Joyce Hoff. Petitioner, however, made no statements implicating himself in the homicide. A short time later, petitioner was asked by Green if he would submit to a polygraph examination on the Hoff case. Petitioner stated that he would rather not answer until he talked to his lawyer, Steve Jorgensen. Green stopped his questioning at this point, but told petitioner that officers would visit him again in the afternoon. Petitioner was then returned to the county jail at approximately 11:45 a.m.

Detectives Skadsen and Green revisited petitioner at about 4:30 p.m. No Miranda warning was given. Petitioner was asked about certain discovered evidence that placed him in Joyce Hoff's apartment on the day of her death. Petitioner admitted being in the decedent's apartment on September 17 and having intercourse with her at that time. He denied any responsibility for her death. After about half an hour of questioning, Green asked petitioner if Joyce Hoff's death was intentional or accidental. Green and Skadsen both testified that petitioner responded by saying it was accidental. Petitioner then stated, "I would rather not talk about it any more at this time until I talk to my attorney, and after that I'll give you a full statement in regards to her death."

511 F. Supp. at 1316. The questioning immediately ended.

Around 9:00 a.m. the next morning petitioner was taken from the county jail by Skadsen, Green, and Deputy Sheriff Hendrick and placed in the sheriff's automobile for the trip back to Sioux Falls. Shortly after the trip began, petitioner was informed of his Miranda rights and asked whether he understood them. Upon indicating his comprehension, petitioner was then asked by the police officers if he was willing to talk to them. Petitioner, according to the testimony of Skadsen and Green, shrugged his shoulders and nodded his head forward. He was then questioned about the death of Joyce Hoff. The discussion of the case did not go beyond questions previously asked of petitioner the day before at the county jail and lasted only fifteen or twenty minutes on that occasion.

It is 600 miles from Green Bay to Sioux Falls, and the trip took from about 9:00 a.m. to about 6:45 p.m. In addition to the questioning that took place at the beginning of the trip, there was "intermittent questioning" about the Hoff homicide "during [the] time period" of the trip. Tr. 85. Petitioner and the officers also engaged in general conversation. Approximately 90 miles from Sioux Falls, however, petitioner became emotional and stated that he "couldn't understand why anybody would want to kill Joyce and that the taking of a human life is so useless."[3] Sergeant Green then told petitioner that he would feel much better if he "got it off his chest." Petitioner stated that he had been wanting to tell somebody, but he just did not know how to go about doing it. He then proceeded, according to Skadsen

[3] Petitioner's own account of this agrees with the testimony of Detectives Skadsen and Green. See 511 F. Supp. at 1316.

and Green, to relate how he had killed Joyce Hoff on September 17, 1973.[4]

After petitioner had given his account of how Joyce Hoff died that night, Green asked him if he would be willing to give a statement to the police when they arrived in Sioux Falls. Petitioner agreed. At that point, according to Skadsen and Green, the following colloquy occurred:

> Q. Your attorney will undoubtedly advise you not to give one (statement).
>
> A. I don't give a damn what he says. I'm doing anything I feel like, and I'll talk to anybody I want to.

511 F. Supp. at 1317. Skadsen and Green testified that that was the first time during the day that petitioner had mentioned his attorney.

Petitioner and the police officers arrived at the Minnehaha County Jail in Sioux Falls around 6:45 p.m. A short time after petitioner was placed in his cell, he notified the jailer that he wanted to talk to Detective Skadsen. According to Skadsen, when he got to petitioner's cell, petitioner was sobbing. He then put his head on Skadsen's shoulder and said, "please tell them that I didn't mean to kill her, that it was an accident -- that I'm not a vicious killer." Ibid.

Petitioner was subsequently charged with the murder of Joyce Hoff. Represented by appointed counsel, petitioner

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[4] For a recitation of petitioner's statement as testified to by Sergeant Green, see 511 F. Supp. at 1316-17.

filed a motion to suppress all of the admissions on the ground that his constitutional rights had been violated. After a hearing, the motion was denied. A jury later convicted petitioner of first-degree manslaughter and sentenced him to life imprisonment in the South Dakota State Penitentiary.

Petitioner appealed his conviction to the South Dakota Supreme Court, which remanded the case for findings of fact and conclusions of law on the suppression issue. (The trial court had simply denied the motion to suppress from the bench, without making findings for the Supreme Court to review.) State v. Stumes, 90 S.D. 382, 241 N.W.2d 587 (1976). The trial court was given the authority to make the determination whether petitioner's admissions were voluntary. On remand, the court so found, and petitioner's conviction was "automatically affirmed." 511 F. Supp. at 1318. Under this procedure, Stumes never got an appellate review in the state courts of the findings relevant to the suppression issue.

Petitioner sought a writ of habeas corpus in the District Court based on claims that had been previously raised and decided by the state courts. After holding evidentiary hearings and allowing the submission of additional evidence, the court found that "petitioner ha[d] established, pursuant to 28 U.S.C. §2254(d)(3), by convincing evidence . . . that material facts were not adequately developed at the state court hearing and the presumption of correctness does not apply." Stumes v. Solem, 511 F. Supp. 1312, 1319 (D.S.D. 1981); see Sumner v. Mata, 449 U.S. 539 (1981).[5]

[5] The State does not complain that the District Court erroneously failed to accord a presumption of correctness to the findings of the state courts.

The District Court, however, ultimately rejected petitioner's constitutional claims and denied the writ of habeas corpus.

On appeal, petitioner contends that his right to counsel under the Fifth, Sixth, and Fourteenth Amendments was violated, and that his Sixth and Fourteenth Amendment rights were violated by the admission into evidence of certain exhibits and by the instructions given to the jury on the elements of the offense of first-degree manslaughter.

II.

A.

Petitioner's initial constitutional claim rests on the accepted principle that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. See Miranda v. Arizona, supra. It also has a basis in the Sixth Amendment's guarantee of the right to legal representation at the commencement of adversary judicial criminal proceedings. See Brewer v. Williams, 430 U.S. 387 (1977); United States v. Wade, 388 U.S. 218 (1967); Massiah v. United States, 377 U.S. 201 (1964). The District Court held that petitioner's Sixth Amendment right to counsel was not violated because adversary judicial proceedings had not commenced. Because we hold that the admission at trial of petitioner's statements violated the Fifth and Fourteenth Amendments as construed in Edwards v. Arizona, supra, we need not decide the Sixth Amendment issue.

Edwards was decided after the District Court's opinion was filed. There, the defendant was the object of an arrest warrant charging him with robbery, burglary, and first-degree

murder. Upon being arrested, he was taken to the police station and informed of his Miranda rights. Edwards stated he understood his rights and was willing to be questioned. During interrogation, defendant sought to "make a deal," but stated that he wanted an attorney before making a deal. At that point, the questioning ceased, and Edwards was returned to his cell. The next morning, two detectives showed up at the jail, wanting to see defendant. When told that the detectives were there, Edwards replied that he did not want to talk to anyone. The jail guard told defendant he "had to" see the detectives, who later questioned Edwards after first again informing him of his Miranda rights. During the course of questioning, defendant implicated himself in the crimes.

Edwards was convicted after evidence of his confession was admitted at trial. On appeal, the Supreme Court of Arizona affirmed, holding that defendant had waived his right to remain silent and his right to counsel by voluntarily giving his statement to police after being informed of his rights. The Supreme Court reversed, ruling that the use of Edwards's confession against him at trial violated his rights under the Fifth and Fourteenth Amendments. The Court stated:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.

101 S. Ct. at 1884.

The Court further held:

> [A]n accused, ..., having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchange or conversations with the police.

101 S. Ct. at 1885.

Applying Edwards to the specific facts of this case, we examine each of the custodial interrogation sessions.

1.

When petitioner was questioned on the morning of October 1, 1973, he was first advised of his rights by Sergeant Green. Petitioner stated he understood his rights and that he did not object to questioning without the presence of his attorney. No incriminating statements, however, were elicited from petitioner during this session. A short time later, when asked if he would submit to a polygraph test, petitioner stated that he would rather not answer until he talked to his lawyer. Questioning immediately ceased at this point. The District Court found that petitioner was adequately informed of and comprehended his Fifth Amendment right to counsel and that, therefore, no violation of petitioner's Fifth Amendment right to counsel occurred. Under the standard of Edwards v. Arizona, supra, we see no error in this ruling.

2.

On the afternoon of October 1, Detectives Skadsen and Green revisited petitioner. He was not given his Miranda rights again before questioning began. Petitioner admitted

being in Joyce Hoff's apartment the day of her death and having intercourse with her. Additionally, he responded to a question about whether Joyce Hoff's death was accidental or intentional by saying it was accidental. Petitioner then stated that he would rather not talk about it any more until he had talked to his attorney. No further questions were then asked.

The District Court determined that petitioner should have been readvised of his rights before questioning was resumed at the afternoon interrogation session. The court concluded, however, that failure to exclude petitioner's statement at trial because of this defect was harmless constitutional error. Petitioner's statement that the death had been accidental was his first admission implicating himself in the homicide. We need not decide whether the admission of this statement alone would have been harmless error, however, because, for reasons to be discussed shortly, we take the view that use against petitioner of both his subsequent statements was also error. There can be no doubt that admission of these three statements was not harmless beyond a reasonable doubt. They were an important part of the State's case.

3.

On the morning of October 2, 1973, petitioner was transported from the county jail to Sioux Falls. During the trip, petitioner was informed of his Miranda rights and stated that he understood them. The police officers then asked him if he was willing to talk to them, and petitioner responded by shrugging his shoulders and nodding his head forward. He was then questioned for about twenty minutes about Joyce Hoff's death. Questioning continued

intermittently during the trip. Later in the day, before petitioner's arrival in Sioux Falls, he "broke down" and made several highly incriminating statements, which formed the primary basis of his conviction.

The District Court, although noting that the facts presented a close question of whether petitioner's Fifth Amendment right to counsel was violated by the resumption of questioning, held that because of several factors[6] the resumption of questioning did not violate petitioner's constitutional rights. The Court concluded the petitioner's statements were voluntary and not the product of coercion and held that petitioner had "waived, both expressly and impliedly from the totality of the circumstances surrounding

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[6] Among the factors considered by the District Court were:

(1) previous interrogations were promptly terminated and petitioner's right to cut off questioning was "scrupulously honored;"

(2) questioning was resumed only after the passage of a significant period of time;

(3) petitioner was given the full and complete Miranda warning at the outset of questioning on October 2 and said he understood it;

(4) petitioner when asked if he was willing to talk to police officers indicated a willingness to do so;

(5) petitioner did not at any time on October 2 assert or indicate that he did not want to talk to police or wanted to consult with counsel.

See 511 F. Supp. at 1324. The District Court also thought the questioning in the automobile did not occur in a "police dominated atmosphere." Ibid. We respectfully disagree. Petitioner was under arrest, being returned to Sioux Falls for prosecution, and in the custody of three police officers.

the interrogation, his Fifth Amendment right to counsel." Stumes v. Solem, supra, 511 F. Supp. at 1324.

Despite the factors relied on by the District Court, our decision is controlled by Edwards v. Arizona, supra. Under Edwards, once petitioner had invoked his right to counsel, the resumption of questioning violated his constitutional rights. At the end of the day on October 1, petitioner stated that he would rather not talk any more about Joyce Hoff's death until he spoke with his attorney. The police officers, although ending their questioning at that time, resumed interrogation of petitioner the next morning during the trip to Sioux Falls. This action was impermissible. Petitioner had "expressed his desire to deal with the police only through counsel," and he "[wa]s not subject to further interrogation by the authorities until counsel ha[d] been made available to him." Edwards, 101 S. Ct. at 1885.

As the District Court noted, only the "intentional relinquishment or abandonment of a known right or privilege" constitutes a valid waiver. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). In Edwards, the Supreme Court held that a valid waiver of the right to counsel cannot be established by showing only that petitioner responded to further police-initiated custodial interrogation, even if he has been advised of his Miranda rights. 101 S. Ct. at 1884. Petitioner's remark about taking a human life was not the initiation by him of renewed conversation on the subject of the homicide. It came only after he had been questioned intermittently during the trip, and it led to the crucial admission only after the officer seized on the opportunity to urge petitioner to get the matter off his chest.

The dissenting opinion would distinguish Edwards on the theory that Stumes's remark about taking a human life was the initiation of renewed conversation on the subject of the homicide. We respectfully disagree. We do not regard petitioner's remark as the beginning of a new conversation. Skadsen testified that "during that time period," that is, during the entire trip, "there was intermittent questioning of Norman Stumes," and that "the conversation, although initially it involved Joyce Hoff, it drifted back and forth." Tr. of Oct. 6, 1977, p. 85. Although Stumes testified that there was only "general conversation," post, p. 17, after lunch, as opposed to "interrogation," it is reasonably clear from Captain Skadsen's account that this "general conversation" included conversation about the crime. Stumes's statement that he would talk to the officers despite his attorney's advice to the contrary seems to have come after he had made his damaging admissions.

It is true that in Edwards the defendant was told that "he had" to talk with the detectives. 101 S. Ct. at 1882. But that fact was not essential to the Court's rationale, (though the Chief Justice, concurring in the judgment, thought it dispositive, 101 S. Ct. at 1886-87). The Court's reasoning was simply that once a defendant has invoked his right to counsel he may not again be questioned unless he himself initiates the further communication with the police. Edwards's admissions were excluded even though he was again informed of his Miranda rights (as Stumes was not on the afternoon of October 2), and even though he was "willing to talk," 101 S. Ct. at 1882, and told the officers "'I'll tell you anything you want to know,'" ibid. Perhaps petitioner's statement was "voluntary," in the sense that it was not coerced, but under Edwards that is not enough. See id. at 1884. It must also be apparent that the prisoner has knowingly and intelligently relinquished his right to

counsel. In our view, when this case is judged by the Edwards standard, such a waiver cannot be said to have occurred. It is worth repeating that Stumes's request for counsel was neither generalized nor abstract. His mother had retained counsel for him, it was this particular lawyer whom he wished to consult, and the police knew not only that this lawyer had been retained, but also that he had advised Stumes to exercise his constitutional right of silence.

4.

Upon arrival at the Minnehaha County Jail on the evening of October 2, petitioner requested to speak to Detective Skadsen and subsequently made further inculpatory statements to him. This incident presents us with a close question. Viewed in isolation, it may fall within the exception expressed in Edwards where an accused himself has initiated further conversation with the police. Considering, however, the "totality of the circumstances" surrounding the various interrogations, Fare v. Michael C., 442 U.S. 707, 725 (1979), we conclude that if it had not been for the improper questioning of petitioner by the police officers after petitioner had invoked his right to counsel, his initial highly incriminating statements would not have been made. And probably petitioner would not have asked to talk to Detective Skadsen, further implicating himself in the crime, if those earlier inculpatory statements had not already been elicited. The connection between the improper interrogation and the final incriminating statement is not "so attentuated as to dissipate the taint." Wong Sun v. United States, 371 U.S. 471, 487 (1963) (citing Nardone v. United States, 308 U.S. 338, 341 (1939)).

B.

We mention petitioner's other claims only because they

might arise again if the State tries him a second time, as it is free to do. We have examined these arguments -- that certain physical exhibits were unconstitutionally admitted, and that the evidence of first-degree manslaughter was so slight as to be constitutionally deficient -- and hold that they are without merit.

III.

The judgment is reversed, and the cause remanded to the District Court, with directions to issue the writ discharging Stumes from custody unless the State commences proceedings to try him again within such reasonable time as the District Court may fix.

It is so ordered.

HENLEY, Circuit Judge, dissenting.

I disagree with the majority that Edwards v. Arizona, 101 S.Ct. 1880 (1981), requires reversal. The crucial issue appears to be the admissibility of the statements made by Stumes during the final miles of the trip from Green Bay to Sioux Falls. Although I agree with the majority that Stumes, while riding in a police car for five hundred or six hundred miles[1] with three law enforcement officers, was in a police-

[1] There is record support for the finding of the district court and the majority here that it is six hundred miles from Green Bay to Sioux Falls. However, Officer Skadsen testified in 1977 that the distance is "around five hundred miles." Current highway maps reflect that the distance by interstate highway is about five hundred miles. For at least some portion of the journey no interstate highway was being used; indeed the record does not reflect whether an interstate highway was in existence in 1973 when the journey was made.

dominated atmosphere, there is no indication that he was coerced into talking about the murder. On the contrary, there is every indication that he understood his rights and voluntarily chose to discuss the matter.

Edwards does not bar further interrogation if "the accused himself initiates further communication, exchanges or conversations with the police." 101 S.Ct. at 1885. The preliminary question, then, is whether Stumes' statement about taking a human life constitutes an initiation of further communication. I think that it does. The trip from Green Bay to Sioux Falls began sometime about 9:00 a.m. It appears from the evidence that the travellers stopped for lunch about 2:00 p.m. at some point approximately two hundred fifty miles from Green Bay. Stumes made his statement about taking a human life some sixty to ninety miles outside of Sioux Falls, where they arrived at about 6:45 p.m. At the outset of the trip, Stumes was given Miranda warnings and questioned for only a few minutes. While there is some indication that Stumes was questioned "intermittently" during the trip, Stumes testified that there was no interrogation right after lunch. He said only that there was general conversation up to the time he made the statement in question and indeed it appears that there had been no conversation at all for perhaps ten or fifteen minutes before Stumes spoke. Officer Green recalled nothing Stumes had said after the lunch stop and prior to the confession other than voicing a complaint about his back hurting. According to Officer Green "we all were getting a little tired riding by that time." Thus, it is clear that no memorable mention of the crime occurred from the time of the stop for lunch until Stumes admittedly initiated a conversation. Stumes recounted the beginning of the conversation by testifying "I had a little conflict with my emotions and I made a statement that I couldn't understand why anybody would want to kill Joyce

and that the taking of a human life is so useless." 511 F. Supp. at 1316.

In all the circumstances of the case, including the time factors,[2] it seems clear, even assuming arguendo that some of the earlier questioning may have been suspect, that Stumes' statement was not a result of any interrogation but was, on the contrary, a voluntary initiation of further communication.

Once it is determined that Stumes initiated further communication, the next question is whether he was subjected to subsequent interrogation, and, if so, whether he knowingly and intelligently waived his right to counsel and his right to silence. Edwards v. Arizona, 101 S.Ct. at 1885 n.9. Assuming that telling Stumes he would feel better if he "got it off his chest" amounted to interrogation, the evidence indicates, as the district court found, that Stumes fully understood his rights and voluntarily waived them.[3] He had received Miranda warnings several times and his attorney had advised him by telephone not to talk to anyone. After Stumes' "little conflict with his emotions" prompted him to

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[2] Testimony on behalf of the appellee reflects that Stumes' statement was made "around" Jackson, Minnesota, some ninety miles from Sioux Falls. Stumes placed the conversation between Jackson and Worthington, which from maps appears to be about sixty miles from Sioux Falls. Thus, the conversation probably occurred no more than about one and one-half hours prior to the arrival time at Sioux Falls, 6:45 p.m., and more than three hours after the lunch stop at 2:00 p.m.

[3] Stumes was no novice in dealing with courts, police officers and attorneys. He had been involved in some civil proceedings, in various misdemeanors and in two felony charges against him.

speak, he said that he had been wanting to tell someone about the incident. And, in response to Green's warning that his attorney would advise him not to make a statement, Stumes said that he would talk to anyone he wanted to. This is clearly distinguishable from Edwards, wherein the defendant stated that he did not want to talk to anybody but was told that he "had to." After all, as Justice Powell observes in his concurring opinion in Edwards, "[i]t is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk." 101 S.Ct. at 1888.

Having concluded that Stumes' statements during the trip are admissible, I have little difficulty concerning the other two statements in question. Stumes clearly and voluntarily initiated the meeting with Skadsen in Sioux Falls during which he asked Skadsen to "tell them" that he was not a vicious killer. And finally, I agree with the district court that to the extent the admission of Stumes' statement made the afternoon before the trip was error, it was harmless in view of the seriousness of his later statements.

Although the district court did not have the benefit of the Edwards opinion, I believe that the result reached by the district court is not inconsistent with Edwards and is correct. I would therefore affirm the denial of the petition for a writ of habeas corpus.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

81-2149

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

vs.

NORMAN STUMES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INTRODUCTION

The Petitioner, Herman Solem, has served and filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. This Brief is presented on behalf of the Respondent in opposition to the Petition for a Writ of Certiorari, in accordance with Rule 22 of the Rules of the Supreme Court.

SUMMARY

Norman Stumes (the Respondent) was convicted of manslaughter in a South Dakota State Court in 1974. State vs. Stumes, 241 N.W. 2nd 587 (S.D. 1976). His petition for a Writ of Habeas Corpus was denied by the District Court. Stumes vs. Solem, 511 F. Supp. 1312 (D.S.D. 1981). On appeal, the Eighth Circuit Court of Appeals reversed and remanded. Stumes vs. Solem, Eighth Circuit, March 1, 1982. The State has now petitioned for a Writ of Certiorari.

ARGUMENT AND AUTHORITIES

The Respondent submits that pursuant to Rule 17 of the Rules of the Supreme Court, this is not a proper case for the grant of a Writ of Certiorari. As Rule 17 indicates, review on Writ of Certiorari is "...not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore."

The Petitioner suggests in his Petition that the following questions are presented for review:

1. When does a conversation begin and end?
2. Should an Appellate Court be permitted to find facts without first allowing the State Court or Federal District Court to find the facts?
3. Should Edwards v. Arizona be applied retroactively?

There surely can be no reasonable doubt but that question one and question two do not rise to the level of legal importance which would support the grant of a Writ of Certiorari.

The Petitioner is just plain wrong to suggest that the Court of Appeals in this matter made factual determinations. The District Court, which was in a proper position to decide the facts in this matter, clearly and unequivocally regarded the events of October 2 to constitute a single session of questioning. (See page 12 of the slip opinion from the Eighth Circuit, made a part of the Petition in this matter.) The divergence between the District Court and the Court of Appeals arises not because of a different result factually, but because of a different legal analysis. The majority opinion in the Eighth Circuit

Court of Appeals clearly agrees with the District Court's general factual finding that the automobile trip on October 2 constituted a single session of interrogation. (See page 14 of the slip opinion from the Eighth Circuit, made a part of the Petition in this matter.)

It is only with regards to question three presented by the Petitioner that a colorable argument can be made that the grant of a Writ may be appropriate. Even then, however, a fair analysis suggest that it would be improvident for the Court to grant the Writ requested by the Petitioner.

The Petitioner in the Eighth Circuit Court of Appeals never once suggested in that Court that the "retroactivity" of Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed.2nd 378 (1981), was a matter of concern in this case, until after the decision of the Eighth Circuit was announced. The applicability of Edwards v. Arizona was briefed and argued by the Petitioner in the Eighth Circuit upon its merits with never a suggestion that it was inapplicable.

Furthermore, the Respondent respectfully suggests that retroactivity is in fact not at issue in this matter. A fair reading of Edwards indicates that it does not constitute new law. Instead, Edwards serves to elucidate the specific applicability of Miranda vs. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), and Escobedo vs. Illinois, 378 U.S. 478, 84 S. Ct. 1758 (1964), in certain factual settings.

In reality, Edwards constitutes an example of the proper application of the standards announced in earlier decisions. In short, earlier decisions had held that a suspect had a right to counsel, and the right to be so advised. Edwards, in effect, declared to the police that when you tell a suspect he has the right to counsel, and a request for counsel is made, the right and the request must be respected. Edwards made clear that mere lip service to constitutional standards would not suffice.

CONCLUSION

Your Respondent respectfully submits that circumstances are totally lacking in this matter such as to justify the grant of the Writ of Certiorari. Therefore, your Respondent requests that the Petition in this matter be denied.

DANA, GOLDEN, MOORE & RASMUSSEN
AND TIMOTHY J. McGREEVY

Timothy J. McGreevy
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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Brief in opposition to the Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals in the case of Norman Stumes vs. Herman Solem, was served by United States mail, first class, postage prepaid upon Mark V. Meierhenry, Attorney General, State Capitol, Pierre, South Dakota, 57501 on this 25th day of May, 1982.

DANA, GOLDEN, MOORE & RASMUSSEN
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81-2149

Office - Supreme Court, U.S.
FILED
MAY 28 1982
ALEXANDER L. STEVAS
CLERK

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

vs.

NORMAN STUMES,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Norman Stumes, Respondent above named, by Timothy J. McGreevy, his appointed counsel pursuant to the Criminal Justice Act, in the Eighth Circuit Court of Appeals, and respectfully moves the Court for leave to proceed in Forma Pauperis. The undersigned further represents to the Court that he has been and continues to serve as appointed counsel for the Respondent above named, in connection with this matter both in the Eighth Circuit Court of Appeals, and in the United States District Court for the District of South Dakota. The undersigned's appointment as counsel has been on the basis that the Respondent is an indigent, and has been pursuant to the Criminal Justice Act.

Dated at Sioux Falls, South Dakota, this 24th day of May, 1982.

DANA, GOLDEN, MOORE & RASMUSSEN
AND TIMOTHY J. McGREEVY

By Timothy J. McGreevy
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Motion for Leave to Proceed in Forma Pauperis was served upon Mark V. Meierhenry, Attorney General of the State of South Dakota, State Capitol, Pierre, South Dakota, by mailing to him a true and correct copy thereof by first class mail, postage prepaid, to his respective mailing address, this 25th day of May, 1982.

DANA, GOLDEN, MOORE & RASMUSSEN
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NO. 81-2149

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

NORMAN STUMES,

Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 30, 1982
CERTIORARI GRANTED JULY 6, 1983

TABLE OF CONTENTS

	PAGE
RELEVANT DOCKET ENTRIES	1
STATE V. STUMES, 90 S.D. 382, 241 N.W.2d 587 (1976)	A-1
STUMES V. SOLEM, 511 F.Supp. 1312 (D.S.D. 1981)	A-21
APPLICATION FOR WRIT OF HABEAS CORPUS	A-74
PETITION FOR WRIT OF HABEAS CORPUS	A-86
RETURN TO WRIT	A-96
ORDER DENYING WRIT	A-101
MOTION ON REQUEST FOR STAY OF EXECUTION AND ENFORCEMENT OF JUDGMENT	A-103
ORDER [STAYING EXECUTION OF MANDATE OF EIGHTH CIRCUIT]	A-105
INFORMATION FOR MURDER	A-108
MOTION TO SUPPESS STATEMENTS	A-113
MOTION TO SUPPRESS EVIDENCE	A-115
AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS	A-119
ANSWER TO AFFIDAVIT AND MOTION TO SUPPRESS STATEMENTS	A-122

ORDER DENYING MOTON TO SUPPRESS A-124

FINDINGS OF FACTS AND CONCLUSIONS OF LAW A-126

JUDGMENT A-135

THE OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS, STUMES V. SOLEM, 671 F.2d 1150 (8th Cir. 1982), WAS REPRODUCED IN THE PETITION FOR WRIT OF CERTIORARI AND WILL NOT BE PLACED IN THE JOINT APPENDIX.

RELEVANT DOCKET ENTRIES

Docket Entry	Date
Application for Habeas Corpus	May 3, 1977
Petition for Habeas Corpus	May 3, 1977
State of South Dakota's Return to Writ	July 13, 1977
Petitioner's Motion for Evidentiary Hearing	September 21, 1977
Respondent's Resistance to Motion for Evidentiary Hearing	September 23, 1977
Affidavit of Petitioner in Support of Motion for Evidentiary Hearing	September 26, 1977
Evidentiary Hearing of October 6, 1977	October 6, 1977
Memorandum Decision	April 10, 1981
Order Denying Application for Writ of Habeas Corpus	May 5, 1981
Opinion of United States Court of Appeals	April 26, 1982
Mandate of United States Court of Appeals	April 26, 1982

#11470-rem-OPC

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

***

STATE OF SOUTH DAKOTA,

Plaintiff and Respondent,

vs.

NORMAN STUMES,

Defendant and Appellant.

***

APPEAL FROM THE CIRCUIT COURT
FOR THE FIRST JUDICIAL CIRCUIT
UNION COUNTY, SOUTH DAKOTA

***

THE HONORABLE WAYNE W. CHRISTENSEN
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******

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****

OPINION FILED MAY 6, 1976

COLER, Justice.

Appellant was charged with murder, SDCL 22-16-4, and found guilty of manslaughter in the first degree, SDCL 22-16-16, and he appeals. Appellant asserts as error (1) lack of foundation for admission of certain exhibits; (2) insufficiency of the evidence to support the verdict and (3) failure to suppress admissions against interest made by appellant to police officer.

> The information charged that appellant "on or about the 17th day of September, 1973 in the County of Minnehaha and State of South Dakota aforesaid then and there did wilfully, unlawfully, feloniously, without authority of law and with a premeditated design to effect the death of one Joyce Hoff, a human being, did kill the said Joyce Hoff, and the said Defendant did then and there, and by said means, commit the crime of murder in violation of the provisions of SDCL 22-16-4 * * *."

The victim in this case was found lying on her back on the floor beside her bed in

her apartment during the noon hour on Monday, September 17, 1973. When discovered the body of the victim was clad in a shorty nightgown and covered with a blanket. The county coroner of Minnehaha County, a pathologist, performed an autopsy on the body at approximately 1:45 p.m. on September 17, 1973. His external examination revealed a bruse on the victim's right cheek and cuts on the bridge of her nose and on her lips. Further examination revealed that a finely ribbed, plastic-type, spray can top, some one and three-fourths inches in diameter and in lengh, had been forced into the victim's vagina. The coroner concluded that the cause of death was not natural but was caused from a lack of oxygen, either anoxia or asphyxiation. There were no visible marks of strangulation nor were there any material signs of struggle in the apartment.

The coroner determined that the victim had had intercourse at some time between midnight and 2:00 a.m. prior to her death. He took samples of hair from the head and pubic areas of the decedent. Hairs from various portions of appellant's body, secured under a warrant, and pubic hair which was found to have adhered to the dried blood at the corner of the victim's mouth and certain other hairs which were discovered beneath the victim on her left buttocks were forwarded to the F.B.I. laboratory in Washington, D.C. for comparison.

Appellant has challenged the chain of evidence in respect to the handling of these exhibits at the F.B.I. laboratory. We have reviewed the record and find the showing of the chain of custody in the process used by the F.B.I. laboratory was sufficient to justify the admission in evidence of the

challenged exhibits under the standard enunciated by the court in State v. Christmas, 1968, 83 S.D. 506, 162 N.W.2d 125, and determine that that challenge is without merit.

Pursuant to the instructions given and to which no objection was made, the jury returned a verdict of guilty of manslaughter in the first degree. The instructions given, including one on the lesser included offense, manslaughter in the second degree, were essentially the text of South Dakota Pattern Jury Instructions (Criminal) 3-7-320, 3-7-320a, 3-7-320b, 3-7-320d and 3-7-320e, which are, as indicated in the notes accompanying the pattern instructions, statements gleaned from statute, SDCL 22-16-16, and decisions of this court. Appellant takes the position that the evidence adduced in the trial is not sufficient

to sustain a conviction under the language of the instruction.

The particular instruction which is meaningful for the purpose of our decision since it instructs on the law, particularly SDCL 22-16-16, is Instruction No. 14 reading as follows:

> "14. "The phrase 'in a cruel and unusual manner' as used in our law defining manslaughter in the first degree means that the commission of the homicide must be done with some excess of cruelty or refinement or unusual cruelty under the circumstances sufficiently marked to approach barbarity and to make it especially shocking, and the unusual character of the manner displayed in the killing must stand out as sufficiently unusual and unique or peculiar as to astonish and shock persons of normal sensibilities."

This instruction, the verbatim text of South Dakota Pattern Jury Instructions (Criminal) 3-7-320e, has as its genesis a statement appearing in State v. Lange, 1967, 82 S.D. 666, 152 N.W.2d 635, which, in turn borrowed

from both State v. Knoll, 1905, 72 Kan. 237, 83 P.622 and State v. Diggs, 1965, 194 Kan. 812, 402 P.2d 300, and from decisions of the New York courts, namely, People v. Vollmer, 1949, 299 N.Y. 347, 87 N.E.2d 291 and People v. Lee, 1950, 300 N.Y. 422, 91 N.E.2d 870. An analysis of these cases and on the other extreme, State v. Zemina, 1973, 87 S.D. 291, 206 N.W.2d 819 and State v. Pickering, 1973, 87 S.D. 331, 207 N.W.2d 511, points up that in each case the cause of death and the means by which the act was accomplished were clearly identifiable and involved, under varying circumstances, provocation and physical combatants. The facts of those cases we do not find controlling in this case.

Research of comparable law reveals that our vintage law, SDCL 22-16-16, carried forward from territorial days beginning in

Penal Code of 1877, § 250 and remaining unchanged, has had occasion to be construed by the courts of this state more frequently than like statutes of other states which have been abandoned for newer and more definitive classifications of homicide.[1]

While, contrary to his counsel's advice, appellant took the stand and related to the jury the series of events that led up to his presence in the decedent's apartment throughout the early morning hours of the day of her death, the jury need not have believed his version. He testified to having intercourse with the decedent with her consent and then, in a drugged sleep, having been unaware, except for momentary

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[1] See N.D.C.C. § 12-27-17(2), repealed by Ch. 116, § 41, Session laws of 1973, cf. N.D.C.C. § 1-16-02; K.S.A. § 21-411, repealed, L. 1969, Ch. 180, § 21-4701, of K.S.A. § 21-3203; N.Y. Penal Law of 1909, § 1050, repealed, L. 1965, Ch. 1030, § 2, cf. N.W. Penal Law §§ 125.20, 125.25 (McKinney 1975).

wakefulness, that someone must have entered the apartment and killed Joyce Hoff. Both the version he presented to the jury and to the officers during interrogation would account for hair of characteristics like his own being found on the body of Ms. Hoff. His admissions that he had struck and choked the decedent with his hands does not explain her death as the coroner found no bruise marks on the neck which indicated to him that strangulation, which was the apparent cause of death, was accomplished by use of a cloth or like material which left no discernible mark.

The instruction properly set forth the law. The means used to cause death by strangulation and the duration and extremity of the assault upon the decedent might well be found by a jury to have been cruel and unusual, and indeed, inhuman, in fact. Hence,

the trial court was correct in submitting that phase of the issue to the jury. People v. Lee, supra.

Appellant's remaining claim is that certain admissions given by him to detectives of the Sioux Falls Police Department, Sergeant Green and Chief of Detectives Skadsen, while he was in their custody both in jail in Wisconsin and as a passenger in a motor vehicle with three law enforcement officers on the return trip to Sioux Falls from Wisconsin, were improperly admitted by the trial court. In keeping with State v. Thundershield, 1968, 83 S.D. 414, 160 N.W.2d 408 and State v. Kiehn, 1972, 86 S.D. 549, 199 N.W.2d 594, the trial court held a full evidentiary hearing on the suppression motion. The testimony at this hearing covers some 160 pages of the transcript and includes that both officers to whom the admissions were made and appellant himself

as to the circumstances which brought about the challenged admissions. As stated in State v. Thundershield, supra, and reiterated in State v. Kiehn, supra,

> "* * * it was the province of the judge to consider, reconcile any differences and decide therefrom if the [admissions], beyond a reasonable doubt, [were] voluntarily made under Miranda guidelines. As with other decisions of a trial court, we consider the evidence in the light most favorable to support it."

It would be impractical to detail the evidence produced at the suppression hearing but the essential facts before the trial court were that appellant was taken into custody in Green Bay, Wisconsin, on or about September 27, 1973, on unrelated felony charges pending in Minnehaha County, South Dakota. The two Sioux Falls detectives, previously named, and a Minnehaha County deputy sheriff went from Sioux Falls to

Green Bay to return appellant to South Dakota.

Appellant was represented by an attorney from Sioux Falls employed by his mother to represent him in the pending felony charges. No charges had been filed against appellant for murder although the officers acknowledged that he was a suspect. The attorney who had been hired to represent appellant advised one of the detectives that he had been in telephone contact with appellant in Wisconsin and that he had advised appellant not to talk but "that if he [the appellant] did there was nothing he [the attorney] could do about it."[2] On the

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[2] We have also considered in this connection appellant's contention that since an attorney had been retained, albeit on other charges, the officers were barred from questioning appellant as a murder suspect. The logic of that position we cannot accept as comporting to the purposes of South Dakota Constitution Article VI, § 9 or as

morning of October 1, 1973, appellant was questioned for approximately one and one-half hours and again for approximately

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required by Miranda v. Arizona, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974. We recognize the ultimate threat of such a holding in favoring those with means to retain counsel over those less fortunate, United States v. Masullo, 1973, 2 Cir., 489 F.2d 217, and agree with the New York court that, as here, where counsel had not been employed for the murder charge not then pending, that:

"once the police learn that an attorney has entered the proceeding, it is offensive to our system of justice, in the absence of a waiver, to permit further questioning by representatives of the People. Implicit in this rationale is the concept that the rule does not obtain unless and until the police or prosecutor learn that an attorney has been secured to assist the accused in defending against the specific charges for which he is held. It is, therefore, of no consequence that the law enforcement officials involved herein learned that an attorney had been assigned at the arraignment on the robbery charge since this attorney was in no way connected with the instant criminal proceeding." People v. Taylor, 1971, 27 N.Y.2d 327, 266 N.E.2d 630.

one-half hour in the afternoon in facilities provided by the Brown County, Wisconsin, sheriff's office. Officer Green's testimony, supported by Officer Skadsen, was to the effect that during the morning interrogation appellant had been given the Miranda warnings and that appellant had acknowledged that he understood those rights. During that same period, appellant admitted that he had been in the decedent's apartment the night of her death but made no admissions relative to his complicity in a crime. Later in the morning, in response to a question as to whether he would take a polygraph test he replied that he would not answer that question until he had talked to his attorney. The interrogation ceased at that point.

The two officers returned to the jail late that afternoon and continued questioning without restating the Miranda warnings.

Before the close of the afternoon questioning, Officer Green asked appellant if the death of Joyce Hoff was accidental or deliberate and appellant answered that it was accidental. Thereupon appellant stated he did not want to answer any further questions until he had talked to his attorney and no further conversation occurred that afternoon. On the return trip by car, after a restatement to appellant of his Miranda warnings, he began sobbing in the back seat and made the statement that "taking a human life is so useless." Subsequently, appellant recited some, but not all, of the events which took place leading up to the death of Joyce Hoff. In response to a question of whether or not he would sign a confession upon his return to Sioux Falls, he stated that he would and when advised by

the officers that his attorney would probably advise him not to, appellant was quoted as saying he "didn't give a damn what his attorney said; he could talk to anybody he wanted to." After being booked into the Minnehaha County jail, appellant called Captain Skadsen back to his cell and stated to Skadsen, in the presence of Green, "I want you to know that the death of Joyce [Hoff] was an accident. I'm not a vicious killer."

Appellant, although not denying he was given his statement of rights on two occasions, insisted that he had smuggled on his person some L.S.D. tablets and that at all times material to his being questioned had been taking one or two hits, tending to refute his being in a position to understand his rights or to exercise those rights intelligently.

At the conclusion of the evidentiary hearing the trial court denied from the bench appellant's motion to suppress the admissions. No formal order was entered as contemplated by RCP 7(b) (SDCL 15-6-7(b)) Neither the state nor appellant has challenged the lack of a "decision" on this motion. It is abundantly clear, however, that absent the necessary findings of fact and conclusions of law which make up a "decision" RCP 52(a); Bunnell v. Kindt, 1968, 83 S.D. 377, 159 N.W.2d 923, this court's review is seriously hampered, if not made impossible, because of the inability of this court to determine the credibility of the witnesses which determination is within the purview of the trial court before whom the witnesses appeared.

Under the authority of SDCL 15-26-26 and 15-30-2 and the precedent established by

State v. Faller, 1975, S.D., 227 N.W.2d 433, we may remand for further proceedings. To the same effect see State v. Iowa Dist. Court In & For Linn Cty., 1975, Iowa, 236 N.W.2d 54.

The total lack of findings of fact and conclusions of law in the present case causes us to remand this case for a determination of the factual issue upon the evidence previously adduced.[3]

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[3] This court as well as the trial court must be wary of a mistaken construction of Westover v. United States, or Miranda v. Arizona 1966, both reported at 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 as was credited to the Michigan courts in Michigan v. Mosley, 1975, U.S., 96 S.Ct. 321, 46 L.Ed.2d 313.

Although appellant took the stand, there was no attempt made in this case to use the inculpatory statements for impeachment purposes. The admissions were used in the prosecution's case in chief so there is no factual setting here comparable to that found in Oregon v. Hass, 1975, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570, which should occasion either this court or the trial court to impose greater restrictions on

If any of the admissions admitted into evidence are found to have been involuntary from the "totality of the circumstances," State v. Adkins, 1975, S.D., 225 N.W.2d 598[4], a new trial shall be granted, but if

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police activity than those the United States Supreme Court holds to be necessary under federal constitutional standards. Oregon v. Hass, supra.

In connection with this remand the trial court must consider the similarity of facts in the present case to those reflected in Williams v. Brewer, 8 Cir., 509 F.2d 227, cert. granted, 96 S.Ct. 561, Dec. 15, 1975, and as a further corollary in that case, the role that the trial court's findings of fact and conclusions of law have on appeal.

[4] It should be observed, as it was in Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618, that this court has adopted a strict standard of proof in this type of proceeding. We have said, by way of suggested procedure, that "[w]hen a confession or an incriminating statement allegedly made by the accused is offered by the prosecution and objected to the state has the burden of proving beyond a reasonable doubt the same was freely and voluntarily made." (emphasis supplied) State v. Thundershield, 1968, 83 S.D. 414, 160 N.W.2d 408, see also State v. Kiehn, 1972, 86 S.D. 549, 199 N.W.2d 594. Whether a less strict standard should be applied in light of recent developments in the law, we have not been asked to decide.

all such statements admitted as evidence are found to be voluntary, the judgment shall be affirmed. In either event the trial court shall make the "determination," as suggested by this court in State v. Thundershield, supra, reiterated more explicitly in State v. Kiehn, supra, and which we now hold is required. The determination requiring the entry of findings of fact and conclusions of law we equate with a "decision."

The cause is accordingly remanded for further proceedings.

DUNN, C. J., and WINANS and WOLLMAN, JJ. concur.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

CIV 77-4049

Norman Stumes,

Petitioner

vs.

Herman Solem,

Respondent

MEMORANDUM DECISION

Mr. Edward J. Leahy, of May, Johnson, Doyle & Becker, of Sioux Falls, South Dakota, appeared in behalf of the petitioner;

Ms. Judith A. Atkinson and Ms. LeAnn Larson Finke, Assistant Attorneys General, of Pierre, South Dakota, appeared in behalf of the respondent.

Petitioner, Norman Stumes, seeks a writ of habeas corpus pursuant to 28 U.S.C. 2254. Petitioner alleges that his confinement under the custody of Herman Solem, Warden of the South Dakota State Penitentiary, is based on a conviction in state court for first degree manslaughter that was the result of proceedings that deprived him of his fifth, sixth, and fourteenth amendment rights. Specifically, the petitioner alleges that the state proceedings were constitutionally invalid for the following reasons:

I.

Petitioner was denied his constitutional right to counsel.

II.

The admission into evidence of strands of hair from the victim, the petitioner, and

unidentified hair found on the victim, without sufficient foundation, deprived petitioner of due process of law.

III.

Petitioner's rights to due process of law was violated when the trial court submitted to the jury the question of guilt as to first degree manslaughter over the petitioner's objection.

FACTS AND PROCEDURAL HISTORY

On September 17, 1973, the body of Joyce Hoff was discovered in her apartment at Sioux Falls, South Dakota. She was the apparent victim of a homicide. The policeman investigating the crime described the body as follows:

> I observed a woman that was mostly nude. She had on a light greenish . . . turquoise . . . pair of . . . baby doll pajamas. The bottoms had been ripped mostly off and (were) lying . . . on her left side. The upper part of this night ensemble had been torn and ripped and was lying . . . upon her . . . left shoulder.

The Minnehaha County Coroner performed an autopsy. His external examination revealed that the deceased had a bruised and swollen eye, a round bruise on her cheek, and small scratches and bruises on the bridge of her nose and on her lips. There were also small hemorrhages in the eyes and a discoloration of the neck and face. Further examination revealed that a plastic spray can top had been forced into the victim's vagina.

The Coroner concluded that the cause of death was not natural, but due to a lack of oxygen--either anoxia or asphyxiation. There were, however, no visible marks of strangulation. The Coroner also concluded that the victim had engaged in sexual intercourse sometime between midnight and 2:00 A.M., prior to her death.

During the course of the investigation conducted by the Sioux Falls Police Department, petitioner became one of the suspects. At the time of the investigation petitioner had reckless driving, perjury, and felony check charges pending against him. He was represented on the reckless driving charge by Steve Jorgensen, a Sioux Falls lawyer who had previously represented the petitioner on other matters.

The fact that the petitioner was being sought by the police came to the attention of petitioner's mother, Jean Hamilton. In light of this fact and Mrs. Hamilton's feeling that petitioner had not been treated fairly in previous contacts with police, she contacted Steve Jorgensen relative to retaining him to represent petitioner. She paid Jorgensen $500.00 and he agreed to represent the petitioner. There were, however, no formal charges pending at this

time against the petitioner with respect to the Hoff homicide.

Shortly after accepting the retainer, Jorgensen contacted Don Skadsen, Chief of Detectives, Sioux Falls Police Department, to inform them that he was aware that they were looking for petitioner. Jorgensen testified at the evidentiary hearing that the conversation was as follows:

> (t)hat in all probability, if Norman (petitioner) contacted anyone, he would probably contact me inasmuch as I had represented him in the past, and that I would make a sort of deal with them (police) that if Norman contacted me first, that I would persuade him to surrender himself for questioning, if they would agree that if they found him first, they would contact me and let me talk to him before they began questioning him.

Mr. Jorgensen further testified that the agreement that he had with the police was "with respect that they would contact me if they found him before I did." "They kept their part of the obligation as far as I was

concerned," Jorgensen said; "there wasn't any agreement whatsoever, either express or implied, concerning the scope of questioning that was permissible on the trip from Green Bay to Sioux Falls."

On September 27, 1973, petitioner was arrested in Green Bay, Wisconsin, on the perjury and felony check charges. He was informed that he was under arrest for Sioux Falls authorities, searched, and given his Miranda rights. He was then placed in the Brown County, Wisconsin, jail.

Subsequent to petitioner's arrest and prior to the transporting of petitioner back to South Dakota, Jorgensen was contacted at home by Detective Skadsen to advise him that petitioner had been arrested in Green Bay. Jorgensen then attempted to contact the petitioner at the Brown County Jail. Because of the late hour and the fact that the

person on duty was alone, petitioner could not be brought to the phone. Jorgensen was assured, however, that they would have petitioner call him in the morning. At 7:00 A.M. the next morning petitioner called Mr. Jorgensen. Jorgensen told petitioner "that he was wanted for questioning on a homicide. . ."

> I told him not to talk over the telephone about it, that he should not make any statements to anybody in law enforcement, that he had a right to remain silent, and that he should not make any statements until he had been returned to Sioux Falls and discussed the matter with me.

Later on that week and shortly before Skadsen and Sergeant James Green were to leave for Green Bay, Green and Jorgensen had a chance meeting outside the police department. Jorgensen informed Green that he had told the petitioner not to talk to the Sioux Falls police officers, but then added, "knowing you, you'll have a confession out

of him before you get him back to Sioux Falls." Jorgensen, however, indicated during his testimony at the evidentiary hearing that the remark "certainly wasn't in a serious vein and it wasn't intended to indicate to the detective that he had the okay to take a confession from my client." Green's testimony at the suppression hearing prior to petitioner's trial in state court was that Jorgensen had told him that "he'd talked to Norman on the telephone . . . and had advised him not to talk to us but he stated that if he did talk to us there wasn't anything he could do about it."

On September 30, 1973, Skadsen and Green flew to Green Bay for the purpose of transporting petitioner back to Sioux Falls on the perjury and felony check charges as well as to question him about the death of Joyce Hoff. On the same date, Minnehaha

County Deputy Sheriff Hendrick drove a sheriff's automobile to Green Bay to be used in returning petitioner to Sioux Falls.

On October 1, 1973, at approximately 9:30 A.M., Green, Skadsen, and Hendrick went to the Brown County Jail. After petitioner executed a consent form for the search of his car and residence he was transported to the Green Bay Police Department for questioning. Skadsen, Hendrick, and Lieutenant Milton Steeno of the Green Bay Police Department left to search petitioner's car and room. Green remained behind to question petitioner. At approximatley 10:00 A.M. petitioner was advised of his rights. After his rights were read to him, petitioner stated that he understood his rights and that he had no objection to speaking to officers without the presence of counsel.

During the next hour and one-half the subject of the Joyce Hoff homicide was discussed. At no time did petitioner make any statements implicating himself in the Hoff homicide. At approximately 11:45 A.M. Green advised petitioner that various people in Sioux Falls had taken polygraph examinations relative to the homicide. He then asked petitioner if he would be willing to do so. Petitioner stated, "that is a question I'd rather not answer until I talk to Steve." Questioning ceased at this point, but petitioner was told that the officers would again visit with him in the afternoon. Petitioner was then returned to the county jail at approximately 11:45 A.M.

At about 4:30 P.M. both detectives returned to talk to petitioner. No Miranda warning was given at this time. Petitioner was asked about certain evidence that the

detectives had that placed petitioner in Joyce Hoff's apartment on the day of her death. Petitioner did admit being in decedent's apartment on September 17 and admitted having intercourse with her at that time. He denied, however, any involvement in her death. After approximately one-half hour of questioning Green asked petitioner if Joyce Hoff's death was intentional or accidental. Green and Skadsen both testified that petitioner responded by saying it was accidental. Petitioner then stated, "I would rather not talk about it any more at this time until I talk to my attorney, and after that I'll give you a full statement in regards to her death." The questioning immediately ceased.

The following morning Skadsen, Green, and Hendrick arrived at the county jail at

approximately 9:00 A.M. to pick up petitioner and transport him back to Sioux Falls, a distance of over 600 miles.

Shortly after the trip began petitioner was informed of his Miranda rights and was asked if he understood them. He indicated he did. Petitioner was then asked if he was willing to talk to them. Petitioner, according to Skadsen and Green's testimony, shrugged his shoulders and nodded his head forward.

Petitioner was then questioned about the death of Joyce Hoff. According to Skadsen, "we discussed basically the same questions that were discussed the previous afternoon at the sheriff's office." This discussion lasted about 15 or 20 minutes and then the conversation switched to other matters such as the weather, car racing, petitioner's trip to Green Bay, and the Green Bay Packers.

This is confirmed by petitioner's testimony in which he classified the discussion in the car as follows:

Q: "Do you recall any interrogation that morning?"

A: "Not directly interrogation. There were some statements made."

During the trip back to Sioux Falls several stops were made including two or three stops for gas and refreshments and about 250 miles from Green Bay a stop for lunch. After lunch Skadsen and Green changed places.

After eating and resuming the trip petitioner classified the discussions that took place as follows:

Q. "Do you recall any interrogation after you had eaten?"

A: "No, I don't think there was any interrogation right after we ate. There was a general conversation."

Then, according to Skadsen and Green's testimony, approximately 90 miles from Sioux Falls, petitioner started crying and said, "taking a human life is so useless." This is confirmed by petitioner who described the scene this way: "Somewhere between Jackson and Worthington . . . I had a little conflict with my emotions and I made the statement that I couldn't understand why anybody would want to kill Joyce amd that the taking of a human life is so useless." Petitioner was then asked and testified as follows:

> Q: "Do you recall, was there any interrogation going on at that time. . . .?"
>
> A: "No, I don't believe so. There hadn't -- I don't think there was any conversation in the car for maybe 10 or 15 minutes."

Green then told petitioner he would feel much better if he "got it off his chest."

Petitioner then stated that he'd been wanting to tell somebody, but he just didn't know how to go about it. Then, according to Skadsen and Green's testimony, petitioner related how he had killed Joyce Hoff on September 17, 1973. According to the testimony of Green, petitioner stated that:

> On the early morning of the 17th day of September he'd been at the Mocamba Club, left there at approximately eleven-thirty in the evening, he'd gone home and dropped two tabs of acid, and decided that he wanted to talk to Joyce Hoff in regards to Sierri White. He stated he drove up to Joyce's apartment, parked his car in front of the victim's car -- and this was about one A.M. in the morning -- and he stated that he up and knocked on the door, and she asked who it was, and he identified himself. She asked what he wanted, and he stated he had to talk to her about Sierri White, and she let him in. He said he walked over and sat on the davenport, and she sat down with him, and he started to cry, and he said he couldn't stop. He said that this went on for about 15 minutes. He stated that Joyce got up and said, 'Norman, we'll talk about it when you feel better,' and

she went into the bedroom. He stated that he sat there for about another five minutes, and was still crying, and he walked into the bedroom, and she got up and put her arm around him and tried to comfort him, and one thing led to another and he disrobed her and they had intercourse on the bed, and he said after that they got up and dressed, and she told him at that time that she was going to tell Sierri White what had happened. He said that he begged with her and pleaded with her not to tell her, and she wouldn't change her mind. He stated that at that time he was standing at an angle a little bit to her right, and he said he thought he struck her in the right cheek with his right fist, and she went down to the floor, and he stated that he strangled her with his hands. He stated that after that -- I asked him at that time if he thought that Joyce Hoff was dead at the time he got up, and he stated, "I believe she was. She wasn't breathing." He stated that he covered her up with some blankets. He went down to his car, and got a screwdriver, came back upstairs and took the lock off of the door to make it look like a burglary. He stated that he took $6.00, the lock, and a towel from the house, and left. He stated that the next thing he remembered he woke up at home about two p.m. that afternoon.

Skadsen then asked petitioner how Joyce Hoff was dressed. Petitioner indicated that she had on a full length housecoat and light blue baby doll pajamas. Skadsen asked if the bottoms matched the top and petitioner said he believed they did. Skadsen then stated that there was a foreign object found in the vagina area and asked petitioner if he had placed it there. Petitioner indicated he didn't remember but he might have. Green then asked if petitioner would be willing to give the police a statement when they got back to Sioux Falls. Petitioner indicated that he would. It was at this point that the following exchange took place according to the testimony of Green and Skadsen:

Q: "Your attorney will undoubtedly advise you not to give one (statement)."

A: "I don't give a damn what he says. I'm doing anything I feel like, and I'll talk to anybody I want to."

According to Skadsen and Green's testimony that was the first time during the day that petitioner had mentioned his attorney.

The officers and petitioner arrived at the Minnehaha County Jail in Sioux Falls, at approximately 6:45 P.M. Shortly after the petitioner had been placed in his cell he informed the jailer that he wanted to talk with Skadsen again. According to Skadsen's testimony petitioner was crying again and put his head on Skadsen's shoulder and said, "please tell them that I didn't mean to kill her, that it was an accident--that I'm not a vicious killer."

Petitioner was thereafter formally charged with the murder of Joyce Hoff. Counsel was appointed because of his indigency. A suppression hearing was held at which petitioner requested that the court suppress all of the admissions on the

grounds that his constitutional rights had been violated. The motion was denied.

At trial, both Skadsen and Green testified relative to petitioner's admissions and petitioner was convicted by a jury of first degree manslaughter and sentenced to a term of life in the South Dakota State Penitentiary.

An appeal to the South Dakota Supreme Court was perfected on May 2, 1974. On May 6, 1976, the South Dakota Supreme Court remanded the conviction because of the absence of necessary findings of fact and conclusions of law in support of the order denying the motion to suppress. The Supreme Court instructed the trial court that if the admissions admitted into evidence are found to have been involuntary from the "totality of the circumstances" . . . a new trial shall be granted, but if all such statements

admitted . . . are found to be voluntary, the judgment shall be affirmed. In either event the trial court was given the authority to make the determination. The Supreme Court went on to say that, "the determination requiring the entry of findings of fact and conclusions of law we equate with a decision." State v. Stumes, 241 N.W.2d 587 (S.D. 1976).

Accordingly, the trial court on October 18, 1976, entered findings of fact and conclusions of law specifically finding that, "(T)he State of South Dakota has met its burden of proof beyond a reasonable doubt by showing that the defendant knowingly, voluntarily, and intelligently waived his request for counsel and any other constitutional right which he possessed at the time when he gave incriminating statements to any law enforcement officers." The

conviction was therefore automatically affirmed. Petitioner is currently serving his sentence under the custody of the State of South Dakota.

Petitioner's application for a writ of habeas corpus was filed with this Court on May 3, 1977. All claims raised by petitioner in this Court have been raised and decided on appeal by the South Dakota Supreme Court. State v. Stumes, supra. It is not required that petitioner seek further state post conviction review of those issues. U.S. ex rel. Ted Means v. Solem, 480 S.Supp. 128 (D.S.D 1979), aff'd slip opinion 79-2017 (8th Cir. 6-27-80), Eaton v. Wyrick, 528 F.2d 477 (8th Cir. 1975), United States ex rel. Russell Means v. Solem, 457 F.Supp. 1256 (D.S.D. 1978), Orricer v. State, 85 S.D. 293, 181 N.W.2d 461 (1970).

This Court held evidentiary hearings on October 6, 1977, and May 19, 1978, to more fully develop the factual dispute surrounding petitioner's Fifth and Sixth Amendment claims. At the request of petitioner an additional hearing was held on December 19, 1980, for the purpose of supplementing the record by receiving into evidence police reports that had been in petitioner's possession but were not introduced at the prior evidentiary hearings. The State resisted the request to supplement the record.

The existence of newly discovered evidence would justify holding an evidentiary hearing. Austin v. Swenson, 522 F.2d 168 (8th Cir. 1975). The holding of a hearing, if not mandated, is within the sound discretion of the District Judge. Townsend v. Sain, 372 U.S. 294 (1963), Martin v. Beto, 397 F.2d 741 (5th Cir. 1968), cert. denied, 394 U.S. 906 (1960), 6A

Moore's Federal Practice, 2d Ed. section 59.04 (13), Advisory Committee Note, Rule 8, Rules Governing Section 2254 Cases in United States District Courts. Therefore, this Court grants petitioner's request to supplement the record and the police reports are received into evidence at this time.

In addition to the evidentiary hearings, this Court has examined the original and supplemental (post Rhode Island v. Innis, 100 S.Ct. 1682 (1980)) briefs that have been submitted. This Court has also received and studied the entire transcript, including the preliminary hearing, suppression hearing, and the trial itself.

Under 28 U.S.C. section 2254(d), a federal court has only limited power to reject a determination of a factual issue made by a state court after a hearing on the merits. See also, Sumner v. Mata, 49 L.W.

4133 (January 21, 1981). The statute provides that unless petitioner establishes, or the state admits, one of seven factors, the state determination of a factual issue shall be presumed to be correct. 28 U.S.C. section 2254(d). Alternatively, the state court's factual determination may be rejected if it is not fairly supported by the record. If none of these factors are established, the presumption of correctness applies and can only be overcome by "convincing evidence." Sumner v. Mata, supra.

As Justice Rehnquist declared in Sumner v. Mata, supra,

> The very nature of habeas practice in recent decades makes the friction between the state and federal court systems inevitable. But that friction can be reduced, and section 2254(d) represents Congress' attempt to do just that. Congress meant to insure that state courts' factual findings would not be overturned by a federal court merely on the basis of the "preponderance of the evidence" standard.

This Court on October 6, 1977, entered an order granting petitioner's request for an evidentiary hearing. The order granted the hearing "for the purpose of taking evidence to develop material facts which were not adequately developed at the state court hearing . . . ." This order was based in part on petitioner's affidavit indicating that he wanted to call Steve Jorgensen, the lawyer that was retained by petitioner's mother after petitioner became a suspect in the Hoff homicide. It was this Court's belief that Mr. Jorgensen's testimony was necessary to adequately develop the facts essential to a determination of whether petitioner's constitutional rights were violated.

At the evidentiary hearing testimony from Mr. Jorgensen and Mr. Gene Paul Kean, Minnehaha County States Attorney at the time of the Hoff homicide, was presented. Neither

of these persons testified at trial. Additionally, police reports not presented at trial were received into evidence by this Court.

Therefore, it is the finding of this Court that petitioner has established, pursuant to 28 U.S.C. 2254(d)(3), by convincing evidence, (the testimony of Mr. Jorgensen, Mr. Kean, and the police reports), that material facts were not adequately developed at the state court hearing and the presumption of correctness does not apply. See Sumner v. Mata, supra.

This Court, however, need not shut its eyes to the state's consideration of such issues. Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1952).

Accordingly, while this Court does not afford a presumption of correctness to the state court's factual determination, it does

take cognizance of the fact that both the trial judge and the jury passed on the credibility of various witnesses. Therefore, this Court resolves the disputed facts as set out above.

PETITIONER'S CONSTITUTIONAL RIGHT TO COUNSEL

The constitution of the United States guarantees individuals a right to the assistance of counsel through the provisions of the Fifth and Sixth Amendments. (U.S. Const., amend. V & VI). The Sixth Amendment guarantees the right to legal representation at trial and at various pretrial stages of criminal prosecutions. Argersinger v. Hamlin, 407 U.S. 25 (1972), Gideon v. Wainwright, 372 U.S. 335 (1963), Powell v. Alabama, 287 U.S. 45 (1932); but see Scott v. Illinois, 440 U.S. 367 (1979). The Fifth Amendment, while not explicitly guaranteeing a right to counsel, has been interpreted to

secure a right to legal assistance during custodial interrogation conducted before the filing of formal criminal charges. Miranda v. Arizona, 384 U.S. 436 (1966).

The policies underlying these two constitutional protections are quite distinct. See Rhode Island v. Innis, 100 S.Ct. 1682 (1980, Edwards v. Arizona, No. 79-5269, argument of counsel before United States Supreme Court, 49 L.W. 3399 (December 1980). Therefore, this Court examines separately petitioner's Fifth and Sixth Amendment claims.

SIXTH AMENDMENT

The Sixth Amendment right to counsel safeguards the "fundamental rights of life and liberty." Johnson v. Zerbst, 304 U.S. 458 (1930). At trial, the aid of counsel protects an accused against "convictions resulting from his own ignorance of his

constitutional and legal rights." Id. at 465.

The Sixth Amendment also affords an accused the assistance of counsel before trial, during "critical stages" of the prosecution. United States v. Wade, 388 U.S. 218 (1967). A stage is critical and implicates the Sixth Amendment right to counsel when the government confronts the accused in a manner such that the aid of counsel is necessary to preserve the accused's right to a fair trial, to the effective assistance of counsel at trial, and to meaningful cross examination of witnesses. Id. at 227.

The United States Supreme Court extended the Sixth Amendment "backwards" in Hamilton v. Alabama, 368 U.S. 52 (1961) and Massiah v. United States, 377 U.S. 201 (1964), to guarantee the right to counsel to

an individual confronted by the government at adversary judicial proceedings before trial. See also Kamisar, Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does it Matter?, 67 Geo L.J. 1 (1978).

A further extension "backwards" occurred in Escobedo v. Illinois, 378 U.S. 478 (1964). Under the Court's analysis in Escobedo the individual's Sixth Amendment right to counsel attached because the "focus" of the government's inquiry shifted from investigatory to accusatory and the government's purpose in questioning the suspect was to elicit incriminating statements. See Enker & Elsen, Counsel for the Suspect; Massiah v. United States and Escobedo v. Illinois, 49 Minn.L.Rev. 47 (1964). The Escobedo opinion left lower courts struggling with the notions of "focus" and "purpose" which were not defined "except by reference to each other and the Escobedo facts." Id. at 70.

Then in Miranda v. Arizona, decided on Fifth Amendment grounds, the Court explained that "police custodial questioning" was what Escobedo meant by "focus". 384 U.S. at 444, n. 4. Thus, although Miranda reaffirmed Escobedo's principle that suspects under interrogation are entitled to the assistance of counsel to assure effectuation of their Fifth Amendment privilege, Miranda effectively displaced Escobedo's rationale by assigning protection of the privilege to a newly created Fifth Amendment right to counsel rather than to the right to counsel secured by the Sixth Amendment. Kamisar, supra at 26. Then, in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), the Court construed its earlier Sixth Amendment decisions to establish the principle that an accused "need not stand alone against the

state at any state of the prosecution, formal or informal, where counsel's absence might derogate from the . . . right to a fair trial." The Court indicated it would "scrutinize any pretrial confrontation" to determine whether the presence of counsel was "necessary to preserve the defendant's basic right to a fair trial." United States v. Wade, supra at 227.

Finally, in Kirby v. Illinois, 406 U.S. 682 (1972), in an opinion by Justice Stewart, a plurality of the Court declared that the Sixth Amendment right to counsel only attached "at or after the initiation of formal judicial proceedings can be commenced not only by way of indictment, but also "by way of formal charge, preliminary hearing . . . , information, or arraignment." Id.

This "notified indictment rule" seems now to be firmly established, Moore v. Illinois, 434 U.S. 220 (1977), Brewer v.

Williams, 430 U.S. 387 (1977), United States v. Ash, 413 U.S. 300 (1973), Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers, 60 B.U.L.Rev. 738 (1980), Grano, Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions, 17 Am.Crim.L.Rev. 1 (1979), Kamisar, supra at 83.

In the present case petitioner was not under indictment and had not been charged with anything relating to the Joyce Hoff homicide. Petitioner had been arrested as a suspect in the Hoff homicide and for perjury and felony check charges which were pending against him. His claim, however, of a Sixth Amendment constitutional rights violation relates only to the Hoff homicide questioning. Therefore, it is the opinion of this Court, based on the analysis set out above,

that petitioner's Sixth Amendment right to counsel had not attached because adversary judicial proceedings in the form of indictment, formal charge, preliminary hearing, information, or arraignment in the Hoff homicide had not been commenced. Thus, petitioner's Sixth Amendment right to counsel was not violated.

FIFTH AMENDMENT

The Fifth Amendment right to counsel attaches and comes into play when an individual is subjected to custodial interrogation because at such times the privilege against compelled self-incrimination is jeopardized. Miranda v. Arizona, supra at 477-78. Custodial interrogation was defined by the Court in Miranda as "questioning initiated by law enforcement officers after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444.

Most recently, in Rhode Island v. Innis, 100 S.Ct. 1682 (1980), the Court further defined the term "interrogation" by holding that under Miranda, interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police know are reasonably likely to elicit an incriminating response from the suspect."

Petitioner in this case was questioned on three occasions: the morning of October 1, the afternoon of October 1, and during the car trip back to Sioux Falls on October 2.

There is little doubt that the questioning on October 1, both the morning and afternoon sessions, was custodial interrogation. Whether the conversations in the car on October 2 were interrogation presents a

slightly closer question. This Court is convinced, however, that although petitioner classified the questioning in the car as statements and conversation, the questioning that took place was custodial interrogation as defined in Miranda and Innis. Therefore, any information obtained during these Miranda interrogations is inadmissible at trial unless petitioner waived his right to the assistance of counsel.

WAIVER

Permitting waiver of the right to counsel afforded by the Fifth and Sixth Amendments cuts against the Supreme Court's consistent recognition of the fundamental importance of counsel in the Constitution's scheme of justice. See Faretta v. California, 422 U.S. 806 (1975). Nevertheless, the Court has long sanctioned waiver of the right to counsel noting that the "notion of compulsory counsel was utterly

foreign" to the framers of the Constitution. Id., Johnson v. Zerbst, 304 U.S. 458 (1938). In Johnson the Court established that "intentional relinquishment or abandonment of a known right or privilege" constitutes a valid waiver.

The Supreme Court in recent years, however, had developed a standard for waiver of the Fifth Amendment right to counsel which is less stringent than the standard for Sixth Amendment waivers.

In Fifth Amendment cases the Court seeks to ensure that statements obtained through the interrogation process are voluntary and not the product of coercion. The Miranda Court stated that the provision of the warning and relinquishment of the rights it delineated were "absolute prerequisites" to interrogation. The Court, however, clearly indicated that it did not intend to prohibit all police questioning conducted in

the absence of counsel. Miranda v. Arizona, supra at 477-78. Rather, waiver of Fifth Amendment rights was possible once police had made those rights sufficiently known within the Johnson v. Zerbst framework. The Court acknowledged that an express indication of a desire to waive the Miranda rights followed closely by a statement could satisfy the relinquishment component for waiver. Id. at 475.

Recent decisions in Tague v. Louisiana, 444 U.S. 469 (1980) (per curiam), and North Carolina v. Butler, 441 U.S. 369 (1979), make clear that a suspect must affirmatively indicate that he comprehends the rights described to him in the warnings. He may then waive his Fifth Amendment rights by continuing to talk even though he does not "expressly state as much." North Carolina v. Butler, supra at 374, n.4. Thus, the government can satisfy the Johnson v. Zerbst

requirement for waiver of counsel in the context of a Miranda interrogation by proving that the suspect was informed of and comprehended his Fifth Amendment right to counsel.[1]

This Court now turns to an analysis of each of the custodial interrogation sessions to determine if petitioner waived his Fifth Amendment right to counsel.

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[1] The Court has also articulated the general Johnson v. Zerbst formulation in the context of waiver of the Sixth Amendment right to counsel. Faretta v. California, 422 U.S. 806 (1975). Unlike waiver of the Miranda right to counsel, which requires simply comprehension of the right itself, waiver of the Sixth Amendment right to counsel requires comprehension of the risks of waiving the right and facing trial without counsel. Id. at 835.

The holdings of Williams and Butler also indicated that different standards govern the relinquishment of the Fifth and Sixth Amendment rights to counsel. See Grano, supra at 35, n. 215. The notion that the same waiver standard should apply in both the Fifth and Sixth Amendment right to counsel cases was advanced by Justice White

OCTOBER 1, 1973
MORNING

Shortly after Green and Skadsen arrived to interrogate petitioner he was advised of his Miranda rights, indicated that he understood them and that he had no objection to speaking to officers without the presence of counsel. Petitioner did not make any incriminating statements during this morning session. It should be noted, however, that

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and rejected by the Court in Williams. Williams v. Brewer, supra at 435 , n.5 (White, J. dissenting). The fact that the Butler Court did not cite Williams further suggests that different waiver standards apply in the Fifth and Sixth Amendment contexts. See also Edwards v. Arizona, argument of counsel, 49 L.W. 1087, 3399 (1980).

In any event, since this Court has previously held that the Sixth Amendment right did not attach, only waiver in a Fifth Amendment context will be discussed further.

late in the morning session, petitioner, in response to a question on taking a polygraph examination stated, "that is a question I'd rather not answer until I talked to Steve." Questioning immediately ceased and petitioner was returned to his cell at approximately 11:45 A.M. It appears from this that petitioner was informed of and comprehended his Fifth Amendment right to counsel and that the requirements of Miranda, Tague and Butler were satisfied. Therefore, this Court finds there was not a violation of petitioner's Fifth Amendment right to counsel at the morning session. Additionally, since petitioner did not make any incriminating statements at the morning session, further analysis is not necessary. The morning session remains relevant in the context of the "totality of the circumstances surrounding the interrogation." Fare v. Michael C., 442 U.S. 707 (1979).

OCTOBER 1, 1973
AFTERNOON

At approximately 4:30 P.M. Green and Skadsen returned to question petitioner. No Miranda warning was given at this time. The only possible incriminating statement made by petitioner at this session, however, was when petitioner was asked if Joyce Hoff's death was intentional or accidental. Petitioner indicated it was accidental and that he would rather not talk about it any more until he had talked with his attorney. Questioning of petitioner ceased.

The state contends that the warnings from the morning session carried over to the afternoon session and that a fresh set of Miranda warnings need not be given every time a question is asked. While this Court agrees that a new set of warnings need not be given every time a question is asked, it

does feel that petitioner, at a minimum, should have been readvised of his rights before questioning was resumed at this afternoon session. United States v. Gay, 522 F.2d 429 (6th Cir. 1975), United States v. Collins, 462 F.2d 792 (2d Cir. 1972), United States v. Jackson, 436 F.2d 39 (9th Cir. 1970), Kamisar, supra at 72. Therefore, since this statement was admitted at trial, this Court must determine whether failure to exclude was reversible or harmless constitutional error under Chapman v. California, 386 U.S. 18 (1976), and Fahy v. Connecticut, 375 U.S. 85 (1963). All trial errors which violate the constitution do not automatically call for reversal. Id. Constitutional error that "affects substantial rights" of a party should not be treated as harmless. Chapman v. California, supra at 23. Because the statement obtained

in the afternoon session and admitted into evidence was, at worst only marginally inculpatory and because of the existence of substantial other evidence on which to base a conviction, this Court holds that the admission into evidence of petitioner's statement obtained in the afternoon session was harmless beyond a reasonable doubt. There is sufficient evidence, beyond a reasonable doubt, to conclude that the constitutional error did not contribute to the conviction in any significant way. Id. at 24.

OCTOBER 2, 1973

Petitioner was picked up at the county jail the morning of October 2 for the purpose of transporting him back to Sioux Falls, a distance of some 600 miles. Petitioner was informed of his Miranda rights and indicated he understood them. He

was then asked if he was willing to talk to police officers. Petitioner indicated he was willing by nodding his head forward. Questioning was then resumed for a period of about 20 minutes. Later that same day, however, but not in response to any questioning, petitioner made several statements (which were previously set forth in the facts) that were highly inculpatory and formed the primary basis of his conviction. The Court's inquiry now becomes whether this resumption of questioning violated petitioner's constitutional rights.

In Miranda the Supreme Court stated:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without

> the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice and producing a statement after the privilege has been once invoked.

384 U.S. at 473-74.

Subsequent to Miranda, however, the Supreme Court decided that neither this passage nor any other passage in Miranda created a per se proscription of indefinite duration upon further questioning by police. Michigan v. Mosley, 423 U.S. 96 (1975). See also United States v. Marchildon, 519 F.2d 337 (8th Cir. 1975), and Hughes v. Swenson, 452 F.2d 866 (8th Cir. 1971).

The Court in Mosley stated that:

> Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting.

> We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was scrupulously honored.'

Thus, Mosley stands for the propositions that interrogation may be resumed, at least in some limited circumstances. Michigan v. Mosley, supra at 106.

While this Court feels it presents a close question whether defendant's Fifth Amendment right to counsel was violated by the resumption of questioning, it holds that the resumption of questioning on October 2 during the trip back to Sioux Falls did not violate petitioner's constitutional rights because of the presence of the following factors:

> -previous interrogations were promptly terminated and petitioner's right to cut off questioning was 'scrupulously honored;'

-the questioning was resumed only after the passage of a significant period of time;

-petitioner was given the full and complete Miranda warning at the outset of the questioning on October 2 and said he understood them;

-petitioner when asked if he was willing to talk to a police officer indicated a willingness to do so;

-petitioner did not at any time on October 2 assert or indicate that he did not want to talk to police officers or wanted to consult with counsel;

-the questioning on October 2 took place during an automobile trip and not in the police dominated atmosphere of a police station;

-petitioner was not being questioned at the time he made his incriminating statements, he volunteered them; [2]

-petitioner expressly waived his Miranda rights at one point by stating, "I don't give a damn what he says (his attorney). I'm doing anything I feel like and I'll talk to anybody I want to;"

-petitioner had been informed of his rights on several previous occasions, including by his attorney, and understood them as demonstrated by his previous invocations of his right to counsel and to cut off questioning;

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[2] Petitioner did not classify any of the questioning that took place on October 2 as interrogation. Rather, he referred to the questioning as statements and conversation. If it is not considered interrogation in the eye of the beholder (petitioner), it is difficult to imagine that the "coercive pressure of the custodial setting" was present within the meaning of Miranda.

-petitioner was knowledgeable of his constitutional rights from previous contacts with the criminal justice system;

-petitioner had consulted with his attorney and had been advised not to talk to law enforcement officers or make any statements until he was returned to Sioux Falls. Despite this advice from his own attorney, petitioner voluntarily chose to talk to law enforcement officers; and

-after the completion of the trip, petitioner called Skadsen to his cell and again made voluntary statements concerning the homicide.

It is the holding of this Court that the statements made by petitioner and obtained through the interrogation process on October 2, 1973, were voluntary and not the

product of coercion. Petitioner was informed of and comprehended the rights described to him in the Miranda warnings and waived, both expressly and impliedly from the totality of the circumstances surrounding the interrogation, his Fifth Amendment right to counsel. Tague v. Louisiana, supra, Fare v. Michael C., supra, and North Carolina v. Butler, supra.

II.

OTHER CLAIMS

Petitioner also claims that his right to due process was violated by the admission into evidence of certain exhibits without proper foundation and that there was insufficient evidence to submit to the jury the charge of first degree manslaughter.

This Court finds petitioner's lace of foundation claim unpersuasive and without merit.

With respect to petitioner's sufficiency of the evidence claim this Court applied the test set out in Jackson v. Virginia, 99 S.Ct. 2781 (1979), and finds that any rational trier of fact could have found the petitioner guilty beyond a reasonable doubt. See Jackson v. Virginia, The Advent of the Reasonable Doubt Standard in Habeas Corpus Proceedings, 25 S.D.L.Rev. 372 (1980).

Accordingly, petitioner's application for a writ of habeas corpus is denied.

This decision constitutes the Court's findings of fact and conclusions of law pursuant to F.R.C.P. 52.

Done and entered at Sioux Falls, South Dakota, this 10th day of April, 1981.

BY THE COURT:

Fred J. Nichol

Senior District Judge

APPENDIX

FOR FOR USE IN APPLICATIONS

FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

NORMAN STUMES
Name

17533
Prison Number

South Dakota State Penitentiary, P. O. Box 911,

Sioux Falls, South Dakota 57101
Place of Confinement

United States District Court
District of South Dakota

Case No. _____
(To be supplied by Clerk of U.S. District Court)

NORMAN STUMES, PETITIONER
(Full name) (Include name under which you were convicted)

V.

HERMAN SOLEM, Warden of the South Dakota State Penitentiary, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF South Dakota, MARK V. MEIERHENRY, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

INSTRUCTIONS--READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and subscribed to under penalty of perjury as being true and correct. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

(2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is Clerk of Court, U.S. District Court, 400 South Phillips Avenue, Sioux Falls, South Dakota 57102.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack First Judicial Circuit Court, Union County, South Dakota.

2. Date of judgment of conviction March 23, 1974.

3. Length of sentence Life

   Sentencing judge Hon. Wayne Christensen

4. Nature of offense or offenses for which you were convicted: First Degree Manslaughter

5. What was your plea? (Check one)
   (a) Not guilty (x)
   (b) Guilty ( )
   (c) Nolo contendere ( )
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____
   _____
   _____
   _____

6. Kind of trial: (Check one)
   (a) Jury (x)
   (b) Judge only ( )

7. Did you testify at the trial? Yes (x) No ( )

8. Did you appeal from the judgment of conviction?
Yes (x) No ( )

9. If you did appeal, answer the following:
(a) Name of court South Dakota Supreme Court
(b) Result Remanded for further proceedings
(c) Date of result May 6, 1976
If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes ( ) No (x)

11. If your answer to 10 was "yes", give the following information:
(a) (1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )
(5) Result _____.
(6) Date of result _____.

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:
(1) First petition, etc. Yes ( ) No ( )
(2) Second petition, etc. Yes ( ) No ( )
(3) Third petition, etc. Yes ( ) No ( )

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____
_____
_____
_____
_____

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds

for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which has unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Certain alleged admissions of Petitioner were admitted at trial in violation of constitutional rights.
Supporting FACTS (tell your story briefly without citing cases or law): Petitioner was in custody in Green Bay, Wisconsin. Police officers from Sioux Falls, South Dakota came there to return him to Sioux Falls, South Dakota. Prior to going to Green Bay, Police Officers were advised by attorney who was representing Petitioner that he did not want them to talk to him. However, at Green Bay jail and on return trip to Sioux Falls, Police questioned Petitioner regarding the death of Joyce Hoff and allegedly obtained certain admissions against interest which were admitted over Petitioner's objection at trial.

B. Ground two: Certain physical evidence was admitted at trial which lacked

proper foundation and therefore violated Petitioner's constitutional rights.

Supporting FACTS (tell your story briefly without citing cases or law): Certain physical evidence was admitted at the trial over Petitioner's objection, for which there was a break in the chain of custody.

C. Ground three: Instruction regarding first degree manslaughter and verdict thereon regardless of fact that they were not supported by record as a whole.

Supporting FACTS (tell your story briefly without citing cases or law): The Court instructed the jury on first degree manslaughter and the jury returned a verdict thereon although the record, as a whole, would not support such instruction or verdict.

D. Ground four: _____

_____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

_____

_____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

_____

_____

_____

_____

_____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (x)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
    (a) At preliminary hearing Joe W. Cadwell, Attorney at Law, 125 West 10th Street, Sioux Falls, South Dakota.
    (b) At arraignment and plea Joe W. Cadwell, Attorney at Law, 125 West 10th Street, Sioux Falls, South Dakota.
    (c) At trial Joe W. Cadwell, Attorney at Law, 125 West 10th Street, Sioux Falls, South Dakota.
    (d) At sentencing Joe W. Cadwell, Attorney at Law, 125 West 10th Street, Sioux Falls, South Dakota.
    (e) On appeal Joe W. Cadwell, Attorney at Law, 125 West 10th Street, Sioux Falls, South Dakota.
    (f) In any post-conviction proceeding _____.
    (g) On appeal from any adverse ruling in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ( ) No (x)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (x)

(a) If so, give name and location of court which imposed sentence to be served in the future: U.S. federal district court for the District of South Dakota, Southern Division.

(b) And give date and length of sentence to be served in future: Nov. 1, 1976, 3 years consecutive.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No (x) Appealed to Eighth Circuit Court of Appeals, has since been heard and decided.

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Executed at Sioux Falls, South Dakota, Minnehaha County.

Wherefore Norman Stumes being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

/s/ Norman Stumes
(Signature)

Subscribed and sworn before me this 30 day of April, 1977.

Edward J. Leahy
Notary Public
or other person authority to administer an oath

/s/ Edward J. Leahy
Signature of Attorney
(if any)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

NORMAN STUMES, Petitioner v. HERMAN SOLEM, as the duly appointed and qualified Warden of the South Dakota State Penitentiary, Respondent.	CIV. 77-4049 PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE FRED J. NICHOL, CHIEF JUDGE OF THE FEDERAL DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA:

The Petitioner, Norman Stumes, respectfully alleges to this Honorable Court:

I.

That your Petitioner is confined in the South Dakota State Penitentiary at Sioux Falls, County of Minnehaha, State of South

Dakota, of which Respondent, Herman Solem, is the Warden.

II.

That your Petitioner is being unjustly and unlawfully restrained of his liberty and detained under color of authority of the State of South Dakota in the custody of the above named Respondent contrary to, and in violation of the Constitution of the United States of America.

III.

That the facts and circumstances concerning the unlawful restraint on Petitioner's liberty are as follows:

(A) That on or about September 17, 1973, Joyce Hoff was discovered in her apartment in Sioux Falls, South Dakota, the apparent victim of a homicide. Thereafter, on or about September 27, 1973, Petitioner was taken into custody in Green Bay, Wisconsin.

Two detectives of the Sioux Falls, South Dakota, Police Department and a Minnehaha County, South Dakota, Deputy Sheriff went from Sioux Falls to Green Bay to return Petitioner to South Dakota. Prior to their leaving for Green Bay, an attorney, who the detectives knew was representing the Petitioner, advised one of the detectives that he had been in telephone contact with Petitioner in Wisconsin and that he had advised him not to talk.

On October 1, 1973, Petitioner was questioned by the police officers in the Brown County, Wisconsin, Sheriff's office. At that time, Petitioner allegedly made certain admissions against interest relative to his whereabouts on the evening of Joyce Hoff's death. During the conversation he stated that he did not want to answer any further questions until he had talked with

his attorney. Later that same day, two officers returned to the jail and continued questioning Petitioner. During that conversation, Petitioner again allegedly made certain admissions against interest after which he again stated that he did not want to answer any further questions until he had talked with his attorney.

The following day, Petitioner was placed in a car with the three police officers and returned to Sioux Falls, South Dakota. During that return trip, and in response to further questioning of the police officers, he again allegedly made certain admissions against interest.

(B) Prior to trial of this matter, a hearing was held on February 14, 1974 in which the Defendant moved to suppress the statements or admissions against interest that were allegedly made by the Defendant.

Thereafter, the Court denied the Petitioner's Motion. No formal order was entered by the Court as contemplated by South Dakota Codified Laws 15-6-7(b).

(C) On March 19, 1974, immediately prior to trial, Petitioner again moved the Court to suppress the in custody statements alleged to have been made by Petitioner on October 1, 1974 and October 2, 1974. That Motion was again denied.

(D) During the course of the trial, the Court entered into evidence, over Petitioner's objection, certain exhibits for which there was a lack of foundation. The evidence improperly admitted consisted of certain physical evidence for which there was a break in the chain of custody.

(E) At the close of the trial, the Court instructed the jury relative to the

charge of first degree manslaughter, regardless of the fact that the record of the trial, as a whole, would not fairly support such a factual determination.

(F) On the 27th day of March, 1974, the aforementioned Court entered Judgment in this matter, pursuant to the jury verdict rendered on March 23, 1974 wherein Petitioner was convicted of first degree manslaughter committing the Petitioner to imprisonment in the South Dakota State Penitentiary situated in Sioux Falls, County of Minnehaha, State of South Dakota, at hard labor, for the full term and period of the rest of his natural life.

(G) Petitioner perfected his appeal to the South Dakota Supreme Court on April 11, 1974.

(H) On May 6, 1976, the South Dakota Supreme Court rendered its decision on that

appeal which is found at 241 NW 2d 587. In that decision, the South Dakota Supreme Court remanded the case to the trial court for Findings of Fact and Conclusions of Law relative to the suppression hearing held on the Petitioner's alleged admissions against interest. In so remanding, the South Dakota Supreme Court stated that if the admissions admitted into evidence were found to be involuntary a new trial should be granted, however, if all statements admitted were found to be voluntary, the Judgment should be affirmed.

(I) On October 18, 1976, the trial Judge entered Findings of Fact and Conclusions of Law wherein it was found that the alleged admissions by Petitioner were made voluntarily. Thus, a new trial was not granted and the decision of the trial court was thereby affirmed by the South Dakota Supreme Court.

IV.

Petitioner submits that the admission of the alleged statements made by Petitioner, the admission of certain physical evidence and the finding that sufficient evidence existed to support the instruction regarding first degree manslaughter and the guilty verdict thereunder constituted a denial of due process and right to counsel guaranteed by the Constitution of the United States. (See Brewer v. Williams, 45 USLW 4287, March 23, 1977)

V.

That Petitioner has exhausted all necessary remedies available to him under the laws of the State of South Dakota in an effort to secure a prompt determination of his constitutional claims.

VI.

That no previous application for the relief prayed for herein has been made to this Court.

WHEREFORE, your Petitioner prays as follows:

1. That this Court issue its Order requiring the Respondent, or whomever the Court shall designate, to appear before this Court and show cause, if any he has, why a Writ of Habeas Corpus should not issue directing that the Petitioner be discharged by Respondents from further custody and restraint.

2. For such other and further relief as the Court may deem just and equitable in the premises.

/s/ Norman Stumes

Norman Stumes, Petitioner

State of South Dakota)
:
County of Minnehaha)

Norman Stumes, being duly sworn, deposes and says: That he is the Petitioner above

named. That he has read the foregoing Petition and knows the contents thereof. That the same is true of his own knowledge and as to those matters he believes it to be true.

/s/ Norman Stumes

Norman Stumes, Petitioner

Subscribed and sworn to before me
this 30th day of April, 1977.

/s/ Edward J. Leahy

Notary Public, South Dakota

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

NORMAN STUMES, Petitioner, v. HERMAN SOLEM, as the duly appointed and qualified Warden of the South Dakota State Penitentiary, Respondent.	)	CIVIL NO. 77-4049 RETURN TO WRIT

COMES NOW the State of South Dakota, and says:

1. The State admits the allegations made in the answers to questions one through nine, inclusive, in the Petitioner's Petition.

2. The State denies the allegations made in Part A of question twelve of the Petition.

3. The State denies the allegations made in Part B of question twelve of the Petition.

4. The State denies the allegations made in Part C of question twelve of the Petition and affirmatively states that the Petitioner is not alleging grounds upon which habeas corpus relief may be granted.

5. Pursuant to Rule 5 of 28 U.S.C. 1 2254, the State says:

> (1) To the best of the State's knowledge, the Petitioner has exhausted his State remedies.
> (2) The State has in its possession on this date, the original Court file which contains the following transcripts:
> 1) the arraignment of October 26, 1973;
> 2) preliminary hearing of October 18, 1973;
> 3) hearing of January 3, 1974, on a motion for an order to produce documents, tangible objects and scientific tests;

4) hearing of February 14, 1974, on motion to suppress alleged admissions against interests made by the Defendant;

5) hearing of February 27, 1974, on a motion for a change of venue;

6) hearing of March 4, 1974, on motion to add the names of four witnesses;

7) hearing of March 5, 1974, on application to add co-counsel;

8) hearing of March 6, 1974, on motions for psychiatric evaluation of Defendant, taking statements of witnesses and the State's assistance in locating witnesses;

9) jury trial of March 19, 20, 21, 22 and 23 of 1974, and;

10) sentence on March 27, 1974.

(3) That attached to this return and made a part hereof, are the following documents which are incorporated into this return and made a part of the same as though the same were fully set out:

1) copies of portions of the transcripts deemed by the State to be relevant;

2) a copy of the Petitioner's brief, and;

3) a copy of the opinion of the South Dakota Supreme Court in this case.

WHEREFORE, Respondent asks that the petition for habeas corpus be denied.

Dated at Pierre, South Dakota, on this 12 day of July, 1977.

Respectfully submitted,

WILLIAM J. JANKLOW
ATTORNEY GENERAL

/s/ B. Elizabeth Godtland

B. Elizabeth Godtland
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501
Telephone: (605) 224-3215

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the State's Return to Writ of Habeas Corpus in the case of Norman Stumes v. Herman Solem, Acting Warden was served by United States mail, postage prepaid, upon Edward J. Leahy at 412 West Ninth Street, Sioux Falls, South Dakota 57104 on this 12 day of July, 1977.

/s/ B. Elizabeth Godtland

B. Elizabeth Godtland
Assistant Attorney General

[State Supreme Court decision, State v. Stumes, 90 S.D. 382, 241 N.W.2d 587 (1976), was attached to Return but not attached here because it is reproduced elsewhere in this Appendix. Portions of state trial transcript were also attached to the Return, but one omitted here.]

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

NORMAN STUMES, Petitioner,	)	CIV 77-4049
v.	)	ORDER
HERMAN SOLEM, Warden, South Dakota State Penitentiary, Respondent.	)	

The Petitioner having sought a writ of habeas corpus pursuant to 28 U.S.C. §2254, and the Court having made and entered its Memorandum Decision in the above-entitled matter on the 10th day of April, 1981, the Court hereby adopts its Memorandum Decision as the findings of fact and conclusions of law in this matter pursuant to Federal Rules of Civil Procedure, Rule 52, and incorporates the Memorandum Decision by referencing this Order. Accordingly, it is

ORDERED that Petitioner's application for writ of habeas corpus be denied.

Done and entered at Sioux Falls, South Dakota this 5th day of May, 1981.

BY THE COURT:
/s/ Fred J. Nichol

Senior Judge

ATTEST:

/s/ William F. Clayton

Mr. William F. Clayton, Clerk
by

/s/ Nancy A. Erickson

Deputy

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

NORMAN STUMES, Petitioner,	)	CIV 77-4049
v.	)	MOTION ON REQUEST FOR STAY OF EXECUTION AND ENFORCEMENT OF JUDGMENT
HERMAN SOLEM, Respondent.	)	

The State of South Dakota hereby requests this Court to issue a Stay in the above case until the request for Writ of Certiorari, which has been filed with the United States Supreme Court has been acted upon. Under 28 U.S.C. 2102(f) such a stay may be granted by a judge of the court rendering the judgment. Since the Eighth Circuit Court of Appeals has issued its mandate, this case is now within the sole control of this Court.

Dated this 26 day of April, 1982.

/s/ Judith A. Atkinson

Judith A. Atkinson
Assistant Attorney General
State Capitol
Pierre, SD 57501-5090
Telephone: (605) 773-3215

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

NORMAN STUMES, Petitioner,	)	CIV 77-4049
v.	)	ORDER
HERMAN SOLEM, ET AL. Respondent.	)	

This case came before the court on May 10, 1982, at 10 a.m. The Petitioner Norman Stumes was present and represented by counsel, Timothy J. McGreevy, and the Respondent was represented by counsel, Judith A. Atkinson of the Attorney General's Office, State of South Dakota.

The Respondent requested this Court to stay the execution and enforcement of judgment entered in this case until the Request for Certiorari to the Eighth Circuit Court

of Appeals can be ruled on by the United States Supreme Court. The Petition by Respondent was mailed to the United States Supreme Court on April 30, 1982. The request for this stay is made under 28 U.S.C. 2101(f). After a hearing on the matter it is

ORDERED that a stay of execution of the mandate of the Eighth Circuit Court of Appeals is granted until the United States Supreme Court either has granted a Writ of Certiorari and heard the case, decided it, and issued its mandate or until the United States Supreme Court has denied the request for a Writ of Certiorari.

Dated this 12th day of May, 1982.

/s/ Fred J. Nichol

Fred J. Nichol
Senior Judge
United States District Court

ATTEST:

/s/ William F. Clayton

Clerk
By: /s/ Nancy Hanson, Deputy

[Certificate of Service omitted in printing]

STATE OF SOUTH DAKOTA) In the Circuit Court thereof,
: ss. Second Judicial Circuit.
County of Minnehaha) SEPTEMBER Term, A.D., 1973

THE STATE OF SOUTH DAKOTA,)
) CIV 73-106
v.) Information for Murder
NORMAN STUMES,)
Defendant.)

GENE PAUL KEAN, States Attorney of the County of Minnehaha, in the name of, and by authority of the State of South Dakota, informs the Court: That NORMAN STUMES on or about the 17th day of September, 1973 in the County of Minnehaha and State of South Dakota aforesaid then and there did wilfully, unlawfully, feloniously, without authority of law and with a premeditated design to effect the death of one Joyce Hoff, a human being, did kill the said Joyce Hoff, and the said Defendant did then and there, and by said means, commit the crime

of murder in violation of the provisions of SDCL 22-16-4, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

/s/ Gene Paul Kean

States Attorney of the County of Minnehaha, State of South Dakota

STATE OF SOUTH DAKOTA,)
) ss.
County of Minnehaha)

GENE PAUL KEAN, being first duly sworn, deposes and says that he is the States Attorney of the said County of Minnehaha; that he has read the foregoing information and knows the contents thereof, and that the same is true of his own best knowledge, information and belief.

/s/ Gene Paul Kean

States Attorney of the
County of Minnehaha,
State of South Dakota.

Subscribed and sworn to before me this 26th day of October, 1973.

/s/ Myrna L. Ford

Notary Public,
Minnehaha County,
South Dakota

[SEAL]

Myrna L. Ford, Notary Public
My Commission Expires
April 18, 1980

WITNESSES KNOWN TO STATES ATTORNEY
AT TIME OF FILING THIS INFORMATION

Robert Dysart
Mary Doornewerd
Kathy Doman
Dr. Richard Schultz
Donald Thomas
Sherman O. Aase
James Lund
Susan Hirsch
Don Skadsen
James Green
Ken Headrick
Rosemary DeCock
Robert Johnson
Dennis Gustafson
Beverly Hoff
Lt. Milton Steno
Sgt. Fields
Harlan Hinders
Francis Konda
Ray Cuccaro
Howard Larson
FBI Agent - Blood Detection Lab
FBI Agent - Hair Detection Lab
Lt. Merle Renli
Dr. Jose Crespo
Dr. Wesley Putnam
Mike Scholdberg (FBI)
Eugene Horst
Gene Gruhlke
Irene Twedt

The State of South Dakota
v.
NORMAN STUMES

INFORMATION FOR MURDER
Filed October 26, 1973, Minnehaha County, S.D.
Roger D. Moan
Clerk of Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT	
THE STATE OF SOUTH DAKOTA, Plaintiff, vs. NORMAN STUMES, Defendant.	)	CRI. 73-106 MOTION TO SUPPRESS STATEMENTS

Defendant moves to suppress as evidence herein all written and oral statements made by him on the following grounds:

1. That the statements were obtained in violation of defendant's privilege against self incrimination and his right to counsel as guaranteed by 5th, 6th and 14th Amendments to the United States Constitution.

2. Further grounds for the suppression of the statements will be developed at the time of the hearing of this motion. It

is noted that the State has represented to the court that they have no written statements or memorandum concerning oral statements before or during the time he was in custody and therefore this motion refers to the testimony of police officer Skadsen and Green and Deputy Sheriff Headrick.

WHEREFORE, defendant respectfully requests this court to suppress as evidence the oral statements made by him.

Dated this 22nd day of January, 1974.

/s/ Joe W. Cadwell

BRAITHWAITE & CADWELL
Attorneys for Defendant
125 West 10th Street
Sioux Falls, SD 57102

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
)
Plaintiff,) CRI. 73-106
)
vs.) MOTION TO SUPPRESS EVIDENCE
)
NORMAN STUMES,)
)
Defendant.)

The defendant, Norman Stumes, moves by his attorney, Joe W. Cadwell, for an Order suppressing all evidence, oral or tangible, obtained directly or indirectly from:

(a) The search warrant dated September 18, 1973 issued by the Judge of the Municipal Court, City of Sioux Falls, the search and seizure pursuant to same being in violation of defendant's rights under the 4th Amendment of the United States Constitution.

(b) The search warrant dated October 4, 1973 issued by the Municipal Judge, City of Sioux Falls, the said search and seizure made pursuant to same being in violation of the defendant's rights under the

4th Amendment to the United States Constitution.

(c) The search and seizure of property from the premises in the defendant's YMCA room at Green Bay, Wisconsin, said search and seizure being in violation of defendant's rights under the 4th Amendment to the United States Constitution.

As grounds for this Motion, counsel for the defendant states:

1. That the search warrant was issued without a showing of probable cause to believe that the defendant had committed the felony alleged in the respective affidavits upon which the subject search warrants were issued.

2. That following his arrest, defendant was placed in the Green Bay jail and held for questioning by police officers of the Sioux Falls Police Department. [In the State trial court record this page is attached to the Motion to Suppress Statements. It appears that the trial court made

error in attaching this page to the Motion and that it should be properly attached to Motion To Suppress Evidence; the first page of it is included in this Appendix.] The nature of the questioning and the premises made therein, without counsel, make the statements made by the defendant involuntary and the result in violations of the 4th, 5th and 6th Amendments to the Constitution of the United States.

3. Said seizures were unlawful because:

a. Each was made pursuant to a warrant and affidavit relying on previously illegally obtained evidence;
b. Each war made pursuant to a warrant and affidavit which did not allege fact sufficient to support belief that defendant had participated in the alleged crime.
c. Each was made pursuant to a warrant which did not particularly describe "things to be seized", and hence involved taking of property not authorized by a magistrate;

4. That the evidence obtained pursuant to said search warrants lack probative value and their introduction would be purely for the purpose of prejudicing the defendant and are not material to the issues of defendant's guilt or innocence.

WHEREFORE counsel respectfully prays that the court order the supression of all evidence resulting from the aforesaid searches and seizures alleged herein.

Further defendant requests a pre-trial hearing on the suppression of the aforesaid matters, all of which would be prejudicial to the defendant if they came in any way before the jury at the trial of the matter.

Dated this 22nd day of January, 1974.

/s/ Joe W. Cadwell

BRAITHWAITE & CADWELL
Attorneys for Defendant
125 West 10th Street
Sioux Falls, SD 57102

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

THE STATE OF SOUTH DAKOTA,
Plaintiff,
vs.
NORMAN STUMES,
Defendant.

CRI: 73-106
AFFIDAVIT OF ATTORNEY IN SUPPORT OF MOTION TO SUPPRESS STATEMENTS

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

Joe W. Cadwell being first duly sworn, deposes and says:

I am the attorney for the defendant in the above entitled proceedings; defendant advised me that he was arrested on or about the 27th day of September, 1973.

At the time of defendant's arrest and shortly thereafter he was interrogated by detectives of the Green Bay Police Force, the Sioux Falls Police Force, and other persons unknown to him.

That said arrest and detention and interrogation were in violation of defendant's Constitutional rights.

At the time of the arrest, defendant was very disturbed mentally and emotionally and that that condition continued at all times material and including the time he was in Green Bay, Wisconsin until after he was returned to the Minnehaha County Jail.

I am informed that the defendant made certain incriminatory statements.

That at the time of his arrest and interrogation prior to two or three days after his return to the Minnehaha County Jail, that defendant was not duly informed and granted his right to counsel and his Constitutional right to stand mute and that statements obtained constituted the fruit of unlawful interrogation in violation of defendant's Constitutional rights guaranteed

under the 5th, 6th and 14th Amendment to the United States Constitution under the circumstances existing.

I believe that the defendant was denied his rights in derogation of the United States Constitution and Constitution of the Laws of the State of South Dakota.

Dated this 22nd day of January, 1974.

/s/ Joe W. Cadwell

Cheri Wiese
Notary Public
Commission Expires April 1, 1980

/s/ Cheri Wiese

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA,	*	CR. 73-106
v.	*	ANSWER TO AFFIDAVIT AND MOTION TO
NORMAN STUMES,	*	SUPPRESS STATEMENTS
Defendant.	*	

* *

Comes now the State of South Dakota through the Minnehaha County State's Attorney and states as follows:

1. Denies that any of the statements obtained from the Defendant were in violation of his constitutional and statutory rights under the United States Constitution, the South Dakota Constitution or the South Dakota Compiled Laws.

2. That the alleged representation made by the State that it had no written statements or memoranda concerning oral

statements of the Defendant is misstated by the Defendant in his Motion to Suppress, and in fact the Plaintiff through the Minnehaha County State's Attorney has furnished all known written statements or memoranda to the Defendant.

WHEREFORE,, the Plaintiff would respectfully request this Court to deny the Defendant's Motion to Suppress Statements.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 14th day of February, 1974.

/s/ Gene Paul Kean

State's Attorney
Minnehaha County, SD

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF UNION) FIRST JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA *

vs. * ORDER DENYING

NORMAN STUMES, * MOTION TO SUPPRESS

Defendant. *

****

Based upon the Findings of Fact and Conclusions of Law entered by the Court upon the day of this order,

IT IS HEREBY ORDERED that the Defendant's motion to suppress all statements made to law enforcement officials is hereby denied in all respects for the reasons set forth in the Court's conclusions of law.

Dated at Sioux Falls, Minnehaha County, South Dakota this 18th day of October, 1976.

/s/ Wayne W. Christensen
Judge

ATTEST:

/s/ Marlene M. Johnson

By: _____
Deputy

FILED

October 19, 1976

Marlene M. Johnson
Clerk of Courts
Union County, South Dakota

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF UNION) FIRST JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA, * CR. #74-11

vs. * FINDINGS OF FACT and

NORMAN STUMES, * CONCLUSIONS OF LAW

Defendant. *

****

(The following findings of fact and conclusions of law are made pursuant to the order set forth in the case of State vs. Stumes, 241 N.W. 2d 587 (S.D. 1976).)

This matter having come on for hearing before the Court on the 14th day of February, 1974, the Honorable Wayne W. Christensen presiding, at the hour of 9:00 A.M. in the courtroom of the Minnehaha County Courthouse; and the State being represented by Gene Paul Kean, States Attorney of Minnehaha County, and the Defendant

appearing in person and with his counsel, Joe W. Cadwell, and the Court having heard the testimony of all witnesses called by the State together with the testimony of the Defendant himself, and the Court having heard all of the other evidence introduced herein, and the Court being requested upon motion of the Defendant to decide the question of voluntariness of statements made by the defendant to law enforcement officials, and the Court having further considered all the records and files herein, now therefore, the Court adopts the following findings of fact for the purposes of this hearing.

FINDINGS OF FACT

1. The Defendant in this case is Norman Stumes.

2. Joyce Hoff was found dead in her apartment on September 17, 1973 under circumstances which led law enforcement personnel to believe a homicide has been

committed. During the course of the investigation of the case, the Defendant became a suspect and was sought by the police for questioning.

The Defendant was eventually located in Green Bay, Wisconsin. On September 30, 1973. Detectives Skadsen and Green of the Sioux Falls Police Department flew to Green Bay to bring the Defendant home on unrelated charges of perjury and bad checks, both felonies. During this time the Defendant was in custody at the Brown County, Wisconsin jail in Green Bay.

4. On the morning of October 1, 1973, Detective Green met the Defendant at the County jail. Prior to conversing with him he read the Miranda warnings to him and the Defendant stated at this time he understood the rights as read. During this conversation the Defendant admitted being at Joyce Hoff's apartment on the night of her death.

At one point while they were talking the Defendant stated he did not wish to continue the conversation. Immediately, Detective Green ceased this discussion, but told the Defendant he would see him later that afternoon.

5. Later on October 1, 1973, after a lapse of about four and one-half hours, both Skadsen and Green went to the Green Bay police department to see the Defendant. Most of the conversation was handled by Skadsen. Toward the end of this one-half hour interview Detective Green asked only one question; that being whether the death of Miss Hoff was intentional or accidental, to which the Defendant replied it was accidental. Again at this point in time the Defendant said he did not want to converse until he talked to his attorney. The conversation ceased immediately.

6. Prior to departing from Sioux Falls to Green Bay, Detective Green had met Attorney Steve Jorgenson who was representing the Defendant on other criminal matters. Jorgenson had talked to Stumes by phone when the Defendant was in Green Bay and he told Green he didn't want them talking to him, but, if he did, there was nothing he could do about it.

7. The next morning, October 2, 1973, Skadsen and Green together with Minnehaha County Deputy Sheriff Ken Headrick, who had driven to Green Bay to transport all the parties home, met the Defendant at the Brown County Jail. This was after the Defendant had eaten breakfast. Before beginning the return trip home the Defendant was given the Miranda warnings a second time. He again stated that he understood these rights. During the trip home the Defendant began crying and made the statement, "Taking a

human life is so useless." Soon after and during portions of the remaining trip home, the Defendant told of some of the details surrounding the death of Joyce Hoff. The Defendant further indicated that he would sign a confession upon arriving home even if he had to do so against the advice of his attorney. After his arrival at the Minnehaha County jail the Defendant told Skadsen that he wanted him to know he was not a vicious killer and that the death was accidental. At no time during the trip home did the Defendant ever express a desire to remain silent or exercise any of the other Miranda rights.

8. The Defendant testified at the hearing that he had been under the influence of drugs at all times when he was being questioned, although he does not deny that the rights were given as Detectives Skadsen and Green stated.

9. Both Detective Skadsen and Green testified that in their opinion, and based upon their observations of the Defendant, he appeared to be normal during all of the interviews. Also, the Defendant was fed upon the return trip from Green Bay.

Based upon the foregoing findings of fact, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. This court has jurisdiction to hear the matter brought before it upon Defendant's motion.

2. From the totality of all the circumstances surrounding this case, the Court concludes further that:

(a) The Defendant received the proper Miranda warnings on each occasion, before any interrogation, and each was read in an intelligent manner which the Defendant indicated he understood.

(b) The accused was not subject to any physical abuse, threatened physical harm, threats to his family or any psychological coercion by threats of potential harm or promises of harm or leniency.

(c) All statements given by the Defendant were done so freely and voluntarily and the Defendant was fully aware of the consequences of his waiver and any statements so made.

(d) The Defendant is found to be in good health, capable of understanding what was stated to him and was not suffering from any mental condition which would affect the voluntariness of the statements he made.

3. It is specifically found by the Court that the State of South Dakota has met its burden of proof beyond a reasonable doubt by showing that the Defendant knowingly, voluntarily, and intelligently waived

his request for counsel and any other Constitutional right which he possessed at the time when he gave incriminating statements to any law enforcement officers.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 18th day of October, 1976.

BY THE COURT:

/s/ Wayne W. Christensen
Judge

ATTEST:

/s/ Marlene M. Johnson
~~ROGER D. MOAN~~, Clerk

By: _____ Deputy

Filed
October 19, 1976
Marlene M. Johnson
Clerk of Courts
Union County, South Dakota

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF UNION) FIRST JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA,

v. JUDGMENT

NORMAN STUMES,

Defendant.

* *

At a regular term of the Circuit Court within and for the County of Union, in the First Judicial Circuit of the State of South Dakota, held at the court house in the City of Sioux Falls, in Minnehaha County and Second Judicial Circuit, on the 27th day of March, 1974;

Present the Honorable Wayne W. Christensen, Presiding Judge, and the officers of said Court.

AN INFORMATION having been duly filed in the Second Judicial Circuit, Minnehaha

County, South Dakota, by Gene Paul Kean, the States Attorney of Minnehaha County, on the 26th day of October, 1973, charging said Defendant with the crime of murder, and said Defendant having been duly arraigned upon the said Information on the 26th day of October, 1974, Joe W. Cadwell, Court Appointed Attorney, appearing as Counsel for said Defendant upon such arraignment said Defendant having duly entered in open Court his oral plea of not guilty of the charge in said Information contained; and said cause having been regularly brought on for trial upon the issue joined therein in the First Judicial Circuit, County of Union, Elk Point, South Dakota, Joe W. Cadwell, appearing as counsel for said Defendant and Gene Paul Kean. State's Attorney in and for Minnehaha County, South Dakota, appearing

for the prosecution, before the Court and a jury duly and legally impanelled and sworn on the 19th day of March, 1974, to try said cause and the jury having heard the evidence adduced on behalf of the State of South Dakota, and on behalf of said Defendant and having on the 23rd day of March, 1974, returned into open Court, in the presence of said Defendant, their oral verdict "we the jury, find the Defendant, Norman Stumes, guilty of first degree manslaughter," the Court thereupon appointed the 27th day of March, 1974, as the time for pronouncing judgment.

And now, March 27, 1974, being the time appointed for judgment herein, the said Defendant appeared for judgment, and with Joe W. Cadwell, Counsel; and thereupon the said Defendant was informed by the Court of the nature of the Information, of his plea, and the verdict therein, and was asked by

the Court whether he had any legal cause to show why judgment should not be pronounced against him; There being no sufficient cause the Court thereupon pronounced the following judgment and

SENTENCE

AND NOW, March 27, 1974, the Court being fully advised in the premises, it is by the court considered, ordered and adjudged, that you

NORMAN STUMES

be imprisoned in the South Dakota State Penitentiary situated in Sioux Falls, County of Minnehaha, and State of South Dakota, at hard labor, for the full term and period of the rest of your natural life, there to be kept, fed and clothed, according to the rules and discipline governing the said South Dakota State Penitentiary.

And it is further ordered that you stand committed to the custody of the Sheriff of Minnehaha County, South Dakota, pending the execution of this judgment.

Done in open Court,

BY THE COURT

/s/ Wayne W. Christensen

Judge

ATTEST:
MARLENE JOHNSON, Clerk

By: /s/Neva Neal

Deputy

Office-Supreme Court, U.S.
FILED
AUG 22 1983
ALEXANDER L. STEVAS,
CLERK

NO. 81-2149

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

NORMAN STUMES,

Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

MARK V. MEIERHENRY
ATTORNEY GENERAL

Richard Dale
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
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QUESTION PRESENTED

Whethe Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), which held that an in-custody suspect who asserts his right to counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police, is to be applied retroactively?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	vi
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISION	2
STATEMENT OF THE CASE AND PROCEDURAL HISTORY	3
SUMMARY OF ARGUMENT	12
ARGUMENTS AND AUTHORITIES	15
A. PARAMETERS OF CUSTODIAL INTERROGATION UNDER THE FIFTH AMENDMENT.	15
B. RETROACTIVE APPLICATION OF A NEW STANDARD OF CRIMINAL PROCEDURE IS NOT REQUIRED BY THE UNITED STATES CONSTITUTION.	31
CONCLUSION	48

TABLE OF AUTHORITIES

CASES:	PAGE
Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)	16
Brown v. Louisana, 447 U.S. 323, 327, 328, 329, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980)	PASSIM
Chimel v. United States, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)	44
Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967)	35
Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966)	35
Edwards v. Arizona, 451 U.S. 477, 483, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378, 387 n. 9 (1981)	PASSIM
Escobedo v. Illinois, 378 U.S. 478, 490, note 14, 12 L.Ed.2d 977, 986, 84 S.Ct. 1758	16
Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)	19
Hankerson v. North Carolina, 432 U.S. 233, 248, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977)	34, 46
Jenkins v. Delaware, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969)	37
Johnson v. New Jersey, 384 U.S. 719, 731 (1966)	32, 35, 36

Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938) 17, 18

Linkletter v. Walker, 381 U.S. 618, 629, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) 31, 48

Mackey v. United States, 401 U.S. 667, 675-702, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) 37, 47

Michigan v. Mosley, 423 U.S. 96, 102, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) 18, 19

Miranda v. Arizona, 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694, 726 (1966) PASSIM

North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979) 20

Oregon v. Bradshaw, ___ U.S. ____, 103 S.Ct. 2830, 2834, 2835, ____ L.Ed.2d ___ (1983) 23, 24

Rhode Island v. Innis, 446 U.S. 291, 300, 302, 303, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) 20, 21, 30

State v. McCloskey, 90 N.J. 18, 446 At.2d 1201 (1982) 37

State v. Shea, 421 So.2d 200 (La. 1982) 37

Stovall v. Denno, 388 U.S. 293, 297, 18 L.Ed.2d 1199, 87 S.Ct. 1967 (1967) 33, 37

Stumes v. Solem, 671 F.2d 1150 (8th Cir. 1982) 25

Tague v. Louisiana, 444 U.S. 469, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980) 20

Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966) 31

Williams v. United States, 401 U.S. 646, 653, 654, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971) 32, 44

Wyrick v. Fields, ___ U.S. ___, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982) 23

OTHER REFERENCES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 10, 49

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix attached to the Petition for Writ of Certiorari.

The opinion of the United States District Court for the District of South Dakota appears in the Joint Appendix.

The opinion of the South Dakota Supreme Court appears in the Joint Appendix and is also reported with the following citation: State v. Stumes, 90 S.D. 382, 241 N.W.2d 587 (1976).

NO. 81-2149

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

NORMAN STUMES,

Respondent,

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit Court of Appeals was entered on March 1, 1982. The Petition for Writ of Certiorari was applied for on April 30, 1982, within the time set by Rule 20.2 of the

Rules of the Supreme Court. The Petition for Writ of Certiorari was granted on July 6, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service and time of War or public danger; nor shall any person be subject for the same offense to twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On the afternoon of September 17, 1973, the body of Joyce Hoff was discovered in the bedroom of her Sioux Falls, South Dakota, apartment. Later that day, the Minnehaha County Coroner performed an autopsy on the body. The Coroner concluded that Ms. Hoff had not

died a natural death, but had died from a lack of oxygen, either anoxia or asphyxiation. Trial Transcript at 566. The Coroner's examination revealed that the victim had a bruise on her right cheek and cuts on the bridge of her nose and on her lips. In addition, a spray can top had been forced into the victim's vagina. Trial Transcript at 573, 576.

On September 27, 1973, the Respondent, Norman Stumes, was arrested in Green Bay, Wisconsin, on charges unrelated to the Hoff homicide. Stumes was advised of his constitutional rights under Miranda and placed in the Brown County, Wisconsin, jail.

On September 30, 1973, a group of Sioux Falls police officers left for Green Bay, Wisconsin, to return Stumes to South Dakota. Detectives James Green and

Don Skadsen took a commercial flight to Green Bay, while Deputy Headrick drove the automobile to Wisconsin that would be used to transport Stumes. The interest in securing Stumes' return to South Dakota was caused not only by the other charges against him, but, because he had become a suspect in the Hoff homicide.

Stumes' mother retained a Sioux Falls attorney, Steve Jorgensen, to represent the Respondent. That attorney was notified when Stumes was arrested, and actually received a telephone call from Stumes while he was in custody. Mr. Jorgensen advised Stumes that he should not make any statement until he had been returned to Sioux Falls and had consulted with Jorgensen. Evidentiary Hearing, October 6, 1977, at 8.

Stumes was first interviewed by the Sioux Falls police officers on October 1, 1973. Detective Green was alone with Stumes that morning, and talked with the Respondent for an hour and a half concerning the Hoff killing. Detective Green advised Stumes of his Miranda rights before discussing the crime, and Stumes indicated his willingness to talk. Upon being asked whether he would submit to a polygraph examination, Stumes stated:

> I'd rather not answer that question until I talk to Steve.'

Trial Transcript 461.

Detective Green ceased questioning Stumes at that point, approximately 11:45 a.m.

At approximately 4:30 p.m. on the afternoon of October 1, Detective Green,

accompanied by Detective Skadsen, returned to talk with Stumes. At this session, Stumes was not given his Miranda warnings. In response to the only question Detective Green asked that afternoon, Stumes said that Joyce Hoff's death was accidental. Trial Transcript 35.

The following morning, October 2, 1973, Detectives Green and Skadsen, and Deputy Headrick, returned to the Brown County Jail to take Stumes back to South Dakota. Shortly after beginning the trip, Detective Green once again advised the Respondent of his constitutional rights. Stumes indicated that he understood his rights and was willing to talk.

The trip was somewhat uneventful until about 90 miles out of Sioux Falls, South Dakota, when Stumes suffered "a little conflict" with his emotions, and

stated that he "couldn't understand why anybody would want to kill Joyce, and that the taking of a human life is so useless." Trial Transcript 625. There was no interrogation occurring at that time. In fact, there had been no conversation for approximately fifteen minutes. Trial Transcript 626. Detective Green then advised Stumes that he would "feel better after he got this off his chest." Trial Transcript 42. Stumes then related the story of how Joyce Hoff died. Id. After Stumes had finished, Green asked him if he would be willing to give a statement when they arrived in Sioux Falls. In the words of Detective Green:

> I told him at that time that his attorney would probably advise him not to. He [Stumes] said he didn't give a damn what his attorney said; he could talk to anybody he wanted to.

Trial Transcript 44.

Upon arrival in Sioux Falls, Stumes was placed in the Minnehaha County Jail. Shortly after admission to the jail, Stumes indicated that he wanted to speak to Detective Skadsen. According to Detective Skadsen:

> He [Stumes] was crying again, and he put his head on my shoulder, and he said, 'Please tell them that I didn't mean to kill her, that it was an accident--that I am not a vicious killer.'

Trial Transcript 547.

Prior to his trial for the murder of Joyce Hoff, Stumes moved the court to suppress the statements made to Green and Skadsen. The motion was denied, the detectives testified at his trial, Stumes was convicted of first-degree manslaughter and sentenced to life imprisonment at the South Dakota State Penitentiary. On appeal to the South Dakota Supreme Court, the case was remanded to the trial

court with instructions to enter Findings of Fact and Conclusions of Law supporting the court s denial of Stumes' motion to suppress his admissions. 241 N.W.2d 587.

The trial court entered its Findings and Conclusions, and Respondent's conviction was thereby affirmed. Id.

Stumes filed his Petition for Habeas Corpus relief under 28 U.S.C. § 2254 on May 3, 1977, in the Southern Division of the District Court for the District of South Dakota. The district court held evidentiary hearings on October 6, 1977, and May 19, 1978. An additional hearing was held on December 19, 1980, to receive police reports in Stumes' possession which had not been introduced at the previous evidentiary hearings.

The district court, in its Memorandum Decision of April 10, 1981, denied Stumes' Application for Writ of Habeas

Corpus. The court found that Stumes had not suffered any deprivation of either his Sixth Amendment or Fifth Amendment rights.

Edwards v. Arizona was decided by this Court on May 18, 1981. On May 31, 1981, Stumes filed his Notice of Appeal of the district court's denial of habeas corpus relief. The Appeals Court, in its opinion of March 1, 1982, held that Edwards required reversal of the district court's decision and ordered that court to issue the writ discharging Stumes unless the State began proceedings to retry the Respondent. Petitioner Solem then sought a writ of certiorari in this Court, and, in the interim, moved the district court to stay the execution of the Court of Appeals' Order. The district court granted the Petitioner's

Motion and this Court granted the writ of certiorari on July 6, 1983.

SUMMARY OF ARGUMENT

Retroactive application of Edwards v. Arizona is not mandated by the United States Constitution. Edwards' emphasis upon the initiation of further dialogue with the suspect who has invoked his right to counsel establishes a new constitutional standard, not foreshadowed by previous decisions of this Court, and should only be applied prospectively.

The criteria for determining whether a new constitutional rule should be applied retroactively requires examination of the rule's purpose, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards.

Brown v. Louisana, 447 U.S. 323, 328 (1980). A rule which corrects any aspect of a criminal trial which impairs its truth-finding function and raises questions about the accuracy of guilty verdicts is to be given retroactive effect. Id.

The Fifth Amendment right to counsel is not primarily concerned with trial truth determination or reliability of verdict. The paramount purpose of the right to counsel is to compel police to conduct custodial interrogations within constitutional dictates and to allow a suspect in custody to exercise his constitutional rights. Retroactive application of Edwards would not further this dual purpose. Retrial of Stumes and possible acquittal of those convicted on trustworthy evidence pursuant to then existing

constitutional standards does not serve the purpose of the rule announced in Edwards. Law enforcement officials had justifiably relied on pre-Edwards standards concerning custodial interrogation, and retroactive application of Edwards would result in retrial of those whose justified convictions have long since become final.

Assuming arguendo, that this Court decides that Edwards does apply retroactively, the State urges this Court to find that the Respondent initiated further conversation with the police, after having requested counsel, and that, viewed in the totality of circumstances, Respondent voluntarily, knowingly, and intelligently waived his right to counsel, and that any statements and admissions made by Respondent were properly admitted into evidence.

ARGUMENTS AND AUTHORITIES

Edwards v. Arizona, supra, which held that an in-custody suspect who asserts his right to counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with police, should not be applied retroactively.

A. PARAMETERS OF CUSTODIAL INTERROGATION UNDER THE FIFTH AMENDMENT.

This Court, in its landmark decision of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), established the procedural guidelines necessary to ensure that criminal suspects subject to custodial interrogation would have the opportunity to exercise their privilege against self-incrimination. The Court

was particularly concerned with the pressures custodial questioning could have on one not assisted by an attorney, and sought to restrain police from using overbearing interrogation practices:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. Illinois, 378 U.S. 478, 490, note 14, 12 L.Ed.2d 977, 986, 84 S.Ct. 1758.[1]

Miranda, 384 U.S. 475.

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[1] Escobedo was concerned with the Sixth Amendment right to counsel, in addition to the Fifth Amendment. As the Sixth Amendment right to counsel does not attach until "adversary judicial proceedings" have begun, see Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), and such proceedings had not been commenced in Stumes' case, the Sixth Amendment is not involved.

While the Court in Miranda saw custodial interrogation as inherently coercive, it did not exclude all statements obtained in such a setting. Statements volunteered by a suspect are admissible. Miranda, supra, 726.

The Court, in deciding Miranda was necessarily concerned with the issue of when a suspect had waived his rights to silence and to counsel. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and

conduct of the accused." Id. Noting the high standards of the past concerning waiver of constitutional rights, see Johnson v. Zerbst, supra, and yet determined to protect those subject to custodial interrogation, the Court issued its Miranda opinion, an opinion which has been refined through the years.

In Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), this Court confronted the situation where an in custody suspect had invoked his right to silence, but had not requested an attorney. After once again being advised of his constitutional rights, the accused was questioned and made several incriminating statements. The Court found no violation of Miranda, noting that the police are prohibited from interrogating a suspect after a momentary cessation when the accused invokes his right to

silence. Michigan v. Mosley, supra, 423 U.S. 102. However, the Court stopped short of mandating a blanket prohibition against the taking of further statements:

> We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut-off questioning' was 'scrupulously honored.' [Footnote omitted.]

Mosley, supra, Id.

In addition to the strictures of Miranda and the need to "scrupulously honor" the assertion of rights by the accused, this Court has continued to examine the totality of circumstances surrounding an alleged waiver of constitutional rights and the need to assertain whether a waiver has been made knowingly and voluntarily. Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). At no time, however, has an

expressed written or oral statement of waiver been necessary to establish a valid waiver of a suspect's Fifth Amendment rights. North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed. 286 (1979). The State must present evidence demonstrating that the Defendant made a knowing and intelligent waiver. Tague v. Louisiana, 444 U.S. 469, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980).

In Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), this Court encountered the difficult problem of determining what constitutes an interrogation for the purposes of triggering the applicability of Miranda.

In Innis, a suspect had been twice advised of his constitutional rights at the scene of arrest and had requested an

attorney. The suspect was placed in the police automobile for transportation to the station. During the trip the accused indicated that he would point out the location of the murder weapon. Shortly before the defendant's statement, however, the officers in the automobile had expressed, to each other, their concern that the gun might be discovered by a young child. While acknowledging that the Miranda safeguards are required when a suspect in custody is subjected to interrogation, Innis, supra, 446 U.S. 300, the Court held that no interrogation had occurred. Innis, supra, 302. While the accused may have been exposed to "subtle compulsion," that was insufficient to establish a violation of Miranda. Innis, supra, 303.

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), reiterated the Court's adherence to the Miranda standards. While once again noting that the waivers of counsel must be voluntary, knowing and intelligent, Edwards, supra, 451 U.S. 483, this Court set its standard for custodial interrogation under the Fifth Amendment:

> . . . we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.[8] We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. [Footnote omitted.]

Edwards, supra at 484.

The court went on to state that the "totality of the circumstances" must be examined to determine if a valid waiver had occurred and that the accused, not the police, must have reopened dialogue with the authorities. Edwards, supra at 387, n.9. Edwards, did not however, establish a "per se" rule concerning the waiver of right to counsel. Wyrick v. Fields, ___ U.S. ___, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982).

Finally, in Oregon v. Bradshaw, ___ U.S. ____, 103 S.Ct. 2830, ____ L.Ed.2d ___ (1983), the Court refined Edwards and indicated how the state could meet its "heavy burden" under Miranda of showing a valid waiver of the right to counsel. This Court clearly stated that the initiation of a conversation with the police by

the accused did not amount to waiver, Bradshaw, supra, 103 S.Ct. at 2834. The two-step analysis set out by the plurality indicated that once an accused, having indicated his desire to have counsel, "initiates" a conversation with police, the court must determine whether a valid waiver took place by examining the totality of the circumstances. In other words, initiation of a conversation is not sufficient in itself to constitute a waiver.

Whether conversation has been initiated, thereby allowing further interrogation, depends upon whether the accused sought to open up "a more generalized discussion relating directly or indirectly to the investigation." Bradshaw, supra at 2835. Statements by the accused "relating to routine incidents of the custodial relationship, will

not generally 'initiate' a conversation in the sense in which that word was used in Edwards." Id.

In its opinion reversing the district court's denial of Stumes' application for habeas corpus relief, the Eighth Circuit Court of Appeals was particularly concerned with his admissions of October 2, 1973. The fact that Stumes told the detectives at the end of the day on October 1, 1973, that he didn't want to talk about Joyce Hoff's death until he spoke with his attorney indicated, at least to the appeals court, that Stumes should not have been interrogated further until counsel was provided. Stumes v. Solem, 671 F.2d 1150 (8th Cir. 1982). The court held that Stumes' rights had been violated on the following day, on the trip back to Sioux

Falls, South Dakota, when the detectives spoke to him concerning the Hoff homicide. Id.

The Eighth Circuit has misconstrued the Edwards decision. Edwards did not establish a "per se" rule prohibiting interrogation once a suspect has invoked his right to counsel. Whether an accused may be later interrogated depends upon whether he has initiated a further exchange with the police, a fact to be determined by viewing all of the relevant circumstances.

Stumes, on October 2, 1973, was again advised of his constitutional rights before the journey from Green Bay, Wisconsin, to Sioux Falls, South Dakota, had barely begun. As the district court pointed out, Stumes was not a novice in dealing with law enforcement. 511 F.Supp. at 1324. He was aware of the

consequences of any comments he might make.

Stumes himself testified at his trial that direct interrogation did not take place during the trip, (Trial Transcript 624) and that "general conversation" engaged the travelers. Trial Transcript 625. When Stumes suffered the "little conflict" with his emotions later on in the afternoon of October 2, 1973, and stated that he "couldn't understand how anybody would want to kill Joyce," and that "the taking of a human life is so useless," he was not being coerced in any manner. There had been no interrogation at that time. In fact, as Stumes testified:

> I don't think there was any conversation in the car for maybe ten or fifteen minutes. [before he made his statement].

Trial Transcript 626.

Stumes had clearly, within the teachings of Edwards, 'initiated' further dialogue with the police. Stumes then related how Joyce Hoff had died on September 17, 1973. Trial Transcript 42-43. Detective Green then admonished Stumes that his attorney would not want him to make a statement to the police, but Stumes indicated his willingness to ignore his counsel's advice and talk to anyone he pleased. Trial Transcript 44.

Viewed within the totality of circumstances, Stumes waived his right to counsel. He had been given his Miranda warnings, not only on October 2, but the day before, and on September 27, 1973, when he was arrested. Trial Transcript 665. He was experienced in dealing with law enforcement and the courts and, at the time he made his statements and

admissions, there had been no conversations within the automobile for approximately fifteen minutes. In addition, as the district court found, Stumes previous request to terminate questioning were "scrupulously honored" and he was free to make the same request during the trip to Sioux Falls, South Dakota. Finally, Stumes' statement that he would talk to anyone he wanted, indicated his willingness to discuss the homicide with the police.

After Stumes had been placed in the Minnehaha County Jail in Sioux Falls, South Dakota, on the evening of October 2, 1973, he made statements that Joyce Hoff's death had been accidental and that he was not a vicious killer. Trial Transcript 46. These statements were made only after Stumes had requested

that Detective Skadsen come to his cell. Id. These statements were not the result of any questioning by police. Clearly, Stumes had initiated a new dialogue with the police. Viewed in the totality of the circumstances, i.e., an experienced criminal who had been previously given Miranda warnings and told that he was a suspect in the Hoff homicide, (Trial Transcript 619) and that he was not subject to any coercion at the time he spoke to Detective Skadsen, there can be no doubt that Stumes waived his right to silence and to counsel.

While the give and take of conversation during the trip to Sioux Falls may have exerted a "subtle compulsion," see Rhode Island v. Innis, supra, upon the Respondent, such influences were not

sufficient to induce Stumes to involuntarily incriminate himself. Even a retroactive application of Edwards justifies the denial of habeas corpus relief to the Respondent.

B. RETROACTIVE APPLICATION OF A NEW STANDARD OF CRIMINAL PROCEDURE IS NOT REQUIRED BY THE UNITED STATES CONSTITUTION.

It is clear that the Constitution neither prohibits nor requires retrospective effect of a constitutional rule of criminal procedure. Linkletter v. Walker, 381 U.S. 618, 629, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966); Brown v. Louisana, 447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980). The question of retroactivity is not determined by the particular provision of the Constitution on which the new rule is

based. Brown v. Louisana, supra, 447 U.S. 327. The court may make a rule prospective when the exigencies of the situation so require. Johnson v. New Jersey, 384 U.S. 719 (1966).

> Where the major purpose of new constitutional doctrine is to overcome the aspect of the criminal trial that substantially impairs the truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.

Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971) (plurality opinion of White, J.). However, when the purpose of the new rule is not to avoid inaccurate guilty verdicts, but other reasons exist for its establishment, then retroactive effect is not prescribed. Id.

This Court has set out its test for determining when retrospective application of a new standard is appropriate:

> . . . the test consistently applied by the court to decide whether a new constitutional doctrine should be applied retroactively contemplates the consideration of three criteria:
>
> > (a) the purpose to be served by the new standards, (b) the extent of the reliance on law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retrospective application of the new standards. Stovall v. Denno, 388 U.S. 293, 297, 18 L.Ed.2d 1199, 87 S.Ct. 1967 (1967).

Brown v. Louisana, supra, 447 U.S. 328.

The purpose of the new rule is the most important of the above criteria. Id. It is a matter of degree concerning the extent to which the purpose of a new

rule requires retroactive application. Id. A rule which prevents unfairness at trial is not automatically to be applied retroactively. Id. at 329. "In short, '[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a question of probabilities." [citations omitted]. "And only when an assessment of those probabilities indicates the condemned practice casts doubt upon the reliabilty of the determinations of guilt in past criminal cases must a new procedural rule be applied retroactively." Id. See also, Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977).

While the above discussion sets out this Court's general principals concerning retroactive application of a new constitutional rule, there have been many

cases dealing with the issue of retroactivity of particular constitutional guarantees. Among these decisions are those involving the Fifth Amendment's right to counsel.

This Court has held on many occasions that the Miranda decision is not required to be applied retroactively. Johnson v. New Jersey, supra; Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966); Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967).

In Johnson v. New Jersey, supra, the petitioner asserted the retroactivity of Escobedo. Miranda having been decided one week before the Court's opinion in Johnson was also discussed. This Court was concerned with the availability of other safeguards to protect the integrity

of the truth-determining process at trial, but concluded that neither Escobedo nor Miranda should be retroactively applied. This Court recognized the retroactive application would not have the "justifiable effect of curing error committed in disregard of constitutional rulings already clearly foreshadowed." Johnson, supra, 384 U.S. 731. In addition, the Court realized that the " . . . retroactive application of Escobedo and Miranda would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." Id.

The Miranda rules have also been held unapplicable to a retrial of a case

originally tried before the Miranda decision was rendered. Jenkins v. Delaware, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969). This Court's reticence to impart retroactive effect to its decisions has extended to other constitutional guarantees. See, for example, Stovall v. Denno, supra, (rule requiring counsel at identification proceedings prospective only); Mackey v. United States, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (privilege against self-incrimination valid defense to charge of failure to register as gambler and pay wagering excise taxes held not retroactive).[2]

---

[2] Two state courts agree that Edwards should not be applied retroactively. See State v. McCloskey, 90 N.J. 18, 446 At.2d 1201 (1982), and State v. Shea, 421 So.2d 200 (La. 1982).

Applying the principles contained in the foregoing discussion clearly militates against the retroactive application of underlying Edwards. The Edwards decision does not represent only an amplification of Miranda. In Edwards, this Court focused on the "initiation" aspect of custodial interrogation. The emphasis on who initiated further dialogue with the accused had not been the most significant consideration in the cases prior to Edwards. That decision, however, brought the initiation issue to the forefront. Police, in addition to the guidelines stated in Miranda, must now be careful not to initiate a conversation with a suspect who has invoked his right to counsel. Before Edwards, a simple inquiry as to whether an accused had changed his mind and wished to speak

to the police in the absence of counsel, would likely not have implicated the suspect's constitutional rights. A similar inquiry, under Edwards, incurs the risk of being characterized as police-initiated interrogation by a reviewing court, and any statements made by the accused liable to suppression. The initiation issue was simply not foreshadowed by other decisions of this Court, and the prohibition on statements made after counsel has been requested represents new constitutional doctrine.

In applying the criteria utilized to determine whether a rule is to be applied retroactively, it is important to note that preservation of the truthfinding process at trial remains a paramount consideration. The purpose of a new rule should be viewed in that context.

The purpose of the constitutional doctrine established in Edwards is not solely connected with ensuring reliable results at trial. Rather, the prohibition against using confessions obtained in the absence of counsel can serve multiple ends. For example, one purpose served by the Fifth Amendment's right to counsel is that of deterring police misconduct in the custodial setting. The police, under Miranda, know that an illegally obtained confession is subject to exclusion. In this manner, the Miranda and Edwards decisions served to motivate police to conform their behavior to constitutional dictates. Related to this consideration is the extremely important end of ensuring that the putative defendant will have the opportunity to exercise his right to counsel. The

concerns above--deterring police misconduct and ensuring that the suspect may exercise his constitutional rights--do not directly implicate truthfinding at trial. If, for example, a justly accused individual whose confession would provide the police with perhaps their only evidence of his involvement in a crime, exercises his right to counsel and to remain silent, and does not give his would-be interrogators a statement, he may well be acquitted if tried. In addition, a guilty individual whose custodial confessions, taken in violation of his rights, were suppressed and excluded from evidence might also be acquitted, if no other available evidence of his guilt were available.

The above examples illustrate that the ensuring of reliable verdicts at trial is subordinated, under the Fifth

Amendment, to the concerns of conforming police conduct to constitutional requirements and guaranteeing that suspects may exercise their constitutional rights. If securing the truth at trial was the sole purpose of the Fifth Amendment, then truthful confessions, even if obtained in violation of a defendant's constitutional rights, would always be admitted into evidence. The purpose of the Edwards rule is to exclude confessions, even if truthful, obtained outside of constitutional dictates. The rule in Edwards, not being directed to repairing any part of the criminal trial which impairs the ascertaining of truth and not concerned with reliability of verdicts, should not be applied retroactively.

As to the second part of the retroactivity test, law enforcement authorities

have relied quite heavily upon the pre-Edwards standards. Those standards clearly established the consequences of obtaining a custodial confession from a suspect who had requested counsel. Those cases did not, however, place such an emphasis upon the initiation of further dialogue with an accused. Nor did they place the police at such constitutional peril for simply inquiring whether a suspect, previously unwilling, had changed his mind and wanted to talk to the police. Edwards created such uncertainty and narrowed the area of acceptable police conduct during custodial interrogation. This Court's decision in Edwards was not foreshadowed by previous cases and upset reliance on what was thought to be clear precedent.

The final consideration regarding retroactivity is that of the effect the

retrospective application of the new rule will have on the administration of justice. This Court, in Williams v. United States, 401 U.S. 646 (1971), refused to apply Chimel v. United States, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) retroactively reasoning that:

> . . . ordering new trials . . . would have involved not only expense and effort but the inevitable risk of unavailable witnesses and faulty memories: the authorities might not have had the evidence they once had and might have been foreclosed from obtaining other evidence that might have secured had they known the evidence they were using was constitutionally suspect.

Williams, 401 U.S. 654.

The above is particularly pertinent to this appeal. The victim in this case was killed ten years ago. If the state has to retry Stumes it will have to attempt to locate witnesses, and those

witnesses will have to try to recollect the events of a decade ago. Other types of evidence, such as hair samples taken from the Respondent and the victim, will have to be located, if they still exist. Obtaining an evidentiary substitute for Stumes' confession will be a difficult, if not impossible, task. The cost of retrying criminals, whose convictions law enforcement officials had long considered final, may well include allowing guilty individuals to walk free.

The evidence in this case does not indicate that the jury reached an unreliable verdict. For example, Stumes testified at trial that he went to Joyce Hoff's apartment in the late night hours of September 16, 1973, had sexual intercourse with her and remained in the apartment until the following morning. Trial Transcript 604-614. Her body was

discovered on the afternoon of September 17, 1973. Hair found on the victim's body was identified as matching hairs taken from Stumes. Trial Transcript 354-356. These items of evidence, among others, in combination with his confession, indicate that Stumes was guilty of killing Joyce Hoff.

Also, time for direct review of Stumes' conviction has long since passed and in this case represents a collateral attack by way of habeas corpus, on his conviction. An approach to the retroactivity issue which is fair to both the individual who seeks review of his conviction and the prosecution is noted by Justice Powell in his concurring opinion in Hankerson v. North Carolina, 432 U.S. 248. That approach would have courts apply a new rule retroactively in cases

pending on direct review, while cases on collateral review would be judged by the rule existing when conviction became final.[3]

Finally, the retroactive application of Edwards is not mandated by the lack of safeguards to protect the rights of criminal suspects. The Miranda standards are still intact and serve to adequately protect those subject to custodial interrogation. For example, an individual who has made statements allegedly induced by unconstitutional police conduct is free to raise his contentions in a pretrial motion to suppress. A finding that the

---

[3] Justice Harlan had first suggested such an approach in Mackey v. United States, supra, 401 U.S. 675-702. He, however, saw an exception to this approach for cases such as Miranda.

statements were not made knowingly, intelligently, and voluntarily will result in their suppression. In sum, the continued application of Miranda and its pre-Edwards progeny militate against the retroactive application of Edwards.

CONCLUSION

Within the perameters of Brown v. Louisana, supra, and Linkletter v. Walker, supra, retroactive application of Edwards is clearly improper and not mandated by the Constitution.

Therefore, the State of South Dakota respectfully requests that this Court reverse the Judgment of the Eighth Circuit Court of Appeals and find that

Respondent was not entitled to habeas corpus relief under 28 U.S.C. § 2254.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

NORMAN STUMES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... (ii)

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE ALLEGED INCRIMINATING STATEMENTS AT ISSUE WERE OBTAINED IN VIOLATION OF THE PRINCIPLE ANNOUNCED IN *MIRANDA* V. *ARIZONA* 6

II. THERE WAS NO VALID WAIVER OF THE RIGHT TO COUNSEL, UNDER EITHER *EDWARDS* V. *ARIZONA* OR PRIOR AUTHORITY 10

III. *EDWARDS* V *ARIZONA* SHOULD BE APPLIED IN THIS CASE 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases: *Page*

Brewer v. Williams,
430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).... 8

Brown v. Louisiana,
447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d
159 (1980)..... 14,15

Edwards v. Arizona,
451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378
(1981) ..... *Passim*

Johnson v. New Jersey,
384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966)... 14

Linkletter v. Walker,
381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965)... 14

Michigan v. Mosley,
423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)..... 6

Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694
(1966) ..... *Passim*

Nardone v. United States,
308 U.S. 338, 60 S.Ct. 266, 84 L.Ed.2d 307 (1939)..... 9

Oregon v. Bradshaw,
103 S.Ct. 2830 (1983) 11

People v. Paintman,
315 N.W.2d 418 (Mich. 1982), Cert. den.
73 L.Ed.2d 1292 11-13

Westover v. United States,
384 U.S. 436, 836 S.Ct. 1602, 16 L.Ed.2d
694 (1966)..... 9

Wong Sun v. United States,
371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)..... 8

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him,; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny

to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this statement of the case, respondent will attempt to limit himself to points which are overlooked or misstated in the brief of the petitioner.

There are four separate transcripts that contain the testimony in this matter. The state pretrial motions, and the state trial are in the transcript referred to as "Trial Transcript." The testimony from the state preliminary hearing is contained in a transcript referred to as "Preliminary Hearing Transcript." Two evidentiary hearings were held in the United States District Court, and they are referred to as "District Court Evidentiary Hearing Transcript #1 or #2."

By the time the detectives from Sioux Falls traveled to Green Bay, at the end of September, 1973, to interrogate and transport respondent, he had become the prime suspect in the death of Hoff. (Trial Transcript 108-109) In fact, it does not appear that the detectives in the interrogations so much as asked respondent a single question relating to any alleged crime other than the Hoff death.

The record indicates that the interrogation in this case took place in three separate phases. The first began at about 9:45 a.m. on October 1, 1973. This interrogation took place in the Green Bay Police Department, to which respondent was transported in the company of several law officers, from the jail where he had been lodged. (Preliminary Hearing Transcript 23, 46) This interrogation was conducted by Detective Green, and began with Green giving respondent his *Miranda* rights. During that interrogation, respondent

made no incriminating statements. Green, during this questioning, asked respondent ". . . if he was responsible for the death of Joyce Hoff, . . ." The respondent replied ". . . he'd rather not answer that until he talked to Steve." (Preliminary Hearing Transcript 49-50) In addition, Green told respondent that "X" number of people had taken and passed a polygraph test concerning the matter and asked if he'd care to submit to such an exam. Respondent indicated he'd like to talk to Steve before answering that question. (Preliminary Hearing Transcript 37)

The "Steve" referred to was the Sioux Falls attorney retained by respondent's mother to represent him. The detectives in Green Bay well knew that the respondent was represented by counsel in connection with the homicide at the time of the interrogation in Green Bay and during the car trip to Sioux Falls. (Preliminary Hearing Transcript 28-30)

This first phase of the interrogation lasted about one hour forty-five minutes, ending at about 11:45 a.m. (Preliminary Hearing Transcript 48)

The second interrogation began at about 4:30 p.m., in the sheriff's office in Green Bay. This interrogation was conducted by Detectives Green and Skadsen. No *Miranda* rights were given to respondent prior to or during this second interrogation. (District Court Evidentiary Hearing Transcript #1 76-79)

During this second session, the prime questioner was Detective Skadsen. (Preliminary Hearing Transcript 52) Skadsen apparently went over the entire matter in his questioning. (Preliminary Hearing Transcript 38) Green asked only one question - was the death of Joyce Hoff intentional or accidental. (Preliminary Hearing Transcript 37-39) According to Green, to that question respondent replied, "accidental," and "I don't want to talk about it anymore until I talk to

Steve." (Preliminary Hearing Transcript 39) This was the first statement allegedly made by respondent which implicated him in the death of Hoff. (District Court Evidentiary Hearing Transcript #1 80)

The next morning, October 2, 1973, the third interrogation session began at about 9:00 a.m. The detective and a deputy picked respondent up to take him to Sioux Falls. Apparently respondent had waived extradition under Wisconsin law. (State Court Record, Page 711, Affidavit of Skadsen)

As soon as the group were all in the car for the drive to Sioux Falls, a trip of at least 500 miles, respondent was advised of his *Miranda* rights. Questioning began almost immediately. (District Court Evidentiary Transcript #1 83-84) The purpose of the questioning was to elicit further incriminating statements from respondent, and began with a review of the alleged incriminating statement of the prior day. During the course of the all-day drive, the conversation drifted to different subjects, so that the direct questions regarding the Hoff death were intermittent. (District Court Evidentiary Hearing Transcript #1 85) The afternoon of October 2, nearing Sioux Falls, it is alleged that the respondent said "taking a human life is so useless." (Trial Transcript 161-162) Green then told respondent he'd feel better if he got if off his chest. (Trial Transcript 477, 522) The detectives then allegedly questioned respondent about the death and allegedly respondent provided incriminating statements which were admitted in evidence at trial. (Trial Transcript 43-45, 83-84, 86-87, 121, 123, 481-482, 456) It was after allegedly obtaining these statements that the detectives for the first time acknowledged to respondent that they knew he had an attorney waiting back in Sioux Falls, and that the attorney wouldn't want him to give a written statement. (Preliminary Hearing Transcript 43-45, 84)

SUMMARY OF ARGUMENT

The decision of the Eighth Circuit Court of Appeals in connection with this matter may be affirmed without reliance on *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). A proper application of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), by itself fully justifies the result reached in the Eighth Circuit.

If a decision in this matter favorable to respondent depends upon the application of *Edwards v. Arizona, supra*, respondent believes that it is not necessary to apply traditional rules governing retroactivity, as Edwards did not in respondent's view establish a new constitutional principle of criminal procedure.

If one assumes that the retroactivity of *Edwards* must be addressed, respondent submits that because *Edwards* in essence only provides a means to insure that rights guaranteed by *Miranda* are in practice honored, and because the right to counsel is so basic to our system of justice, that *Edwards* should be given retroactive application in this case.

Respondent further argues that whether *Edwards* is deemed applicable in this matter or not, respondent believes that under no applicable standard has the petitioner demonstrated appropriately that there was a valid waiver of the right to counsel in this case.

ARGUMENT

I.

THE ALLEGED INCRIMINATING STATEMENTS AT ISSUE WERE OBTAINED IN VIOLATION OF THE PRINCIPLE ANNOUNCED IN *MIRANDA V. ARIZONA*.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), this Court established certain principles regarding police interrogation of criminal suspects. In that case, the Court held, *inter alia*, that a criminal suspect must be advised of his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation and that:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.
>
> *Miranda, supra*, at 474.

In *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L.Ed.2d 313 (1975), the Court addressed the matter of the applicability of *Miranda* to successive interrogations of a suspect. *Mosley* dealt specifically with a suspect's invocation of his right to remain silent, rather than the right to counsel. The Court in *Mosley* made it clear that with respect to a request for counsel, the procedure is detailed in *Miranda, supra*, at 101 (Footnote 7). The *Mosley* case itself is nonetheless instructive. In that case the suspect was questioned about a robbery, after being given *Miranda* rights. The suspect indicated he wished to remain silent. Later that same

day, after the suspect had been lodged in jail, another detective questioned the suspect about an unrelated homicide.

This Court found Mosley's confession to be admissible, because (1) the second interrogation by itself complied fully with *Miranda*; (2) Mosley's right to cut off questioning was fully honored in the first interrogation; (3) full *Miranda* warnings were given before the second interrogation; and (4) the second interrogation related to a distinct offense.

In the case now before this court, *Miranda* rights were given before the first phase of interrogation. During that interrogation the right to counsel was invoked, and questioning ended. No incriminating statements were made. Some four to five hours later, during which time respondent remained in jail, the questioning resumed. Significantly, no *Miranda* rights were given before this second phase of interrogation. The second phase involved two detectives, one of whom had conducted the earlier questioning. It is an understatement to say that the detectives failed "to scrupulously honor" the request for counsel. The detectives just plain ignored the request, conveying most certainly to the suspect the message that his request for counsel had fallen on deaf ears.

Further, the request for counsel at the end of the first interrogation can be read as a two-fold request, involving also the right to remain silent. The distinctions between this case and *Mosley*, on the facts, are obvious. In this case, the second part of the interrogation concerned the *same* alleged crime; it was conducted in part by the same detective; it was not accompanied by fresh *Miranda* rights; the second interrogation, standing alone, would not pass muster under the *Miranda* case. At the end of this second, unlawful interrogation, the first incriminating statement was allegedly obtained. The right to counsel was then invoked again, and questioning

stopped for a time. The District Court in its Memorandum Opinion found that this second phase violated *Miranda,* but held that the error was harmless. (Joint Appendix 64-65).

The questioning resumed at 9:00 a.m. the next morning. By then, the detectives had the "foot in the door" in that respondent had allegedly incriminated himself in the death during the second phase of interrogation the prior day. It can be surmised that by the time the car trip to Sioux Falls began, the detectives may well have seen that ultimate success in the interrogation was near at hand. They, by then, had the suspect allegedly admitting some involvement in the death, and an opportunity to interrogate the suspect off and on for the duration of a 500 mile car trip in an exceedingly coercive atmosphere.

The third phase of the interrogation, that which occurred in the car, may be compared to that which occurred in *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). In *Brewer,* the authorities engaged in a "wide-ranging conversation" during a long car trip, which resulted in a confession being obtained. *Brewer, supra,* at 392.

The Eighth Circuit Court of Appeals in this matter interestingly held that some comments attributed to respondent *after* completion of the car trip from Green Bay were inadmissible based on the "fruit of the poisonous tree" doctrine. *See Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The same analysis can be applied as between the alleged incriminating statement made during the second interrogation, and the "full confession" alleged to have been obtained in the third, and last interrogation. But for the unlawful second interrogation, the first alleged incriminating statement would in all likelihood have never been made, and in turn making the results alleged to have been obtained in the last interrogation highly suspect.

In *Nardone v. United States,* 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed.2d 307 (1939), the Court held that the government may not make derivative use of evidence gained illegally. Seen in the context of this case, it is clear that the "full confession" alleged to have been obtained in the third interrogation owes its genesis to and was derived from the alleged incriminating statement obtained in the unlawful second interrogation. On this basis alone, the Eight Circuit should be affirmed, though admittedly on a basis different than the one expressed by that Court.

The situation in this case is somewhat similar to that which existed in *Westover v. United States,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Because the second part of the interrogation in this case was not preceded by *Miranda* warnings, all that followed was tainted. When *Miranda* rights were given before the third part of the interrogation, from respondent's point of view that was like closing the barn door after the cows have gotten out. By the time warnings were given before the third part of the interrogation, the detectives felt they had their case made, as an incriminating statement had already been elicited.

At a previous point in this brief, a quotation from *Miranda* was set forth. Here, that quotation is restated, with parenthetical comments relating to this case interspersed. The court in *Miranda, supra,* at 474, held:

> If the individual states that he wants an attorney [which respondent did on at least three occasions], the interrogation must cease until an attorney is present. [The interrogation was not stopped when counsel was requested; instead, the interrogation was interrupted after the first request, only to be resumed without so much as a fresh set of *Miranda* rights, and an attorney was not present]. At that time, the individual must have an opportunity to confer with the attorney and to have

him present during any subsequent questioning. [Obviously this was not done, as no attorney was made available, and yet interrogation continued].

II.

THERE WAS NO VALID WAIVER OF THE RIGHT TO COUNSEL, UNDER EITHER *EDWARDS V. ARIZONA* OR PRIOR AUTHORITY.

In *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, the court ruled inadmissible a confession obtained from a suspect at a second interrogation following a request for counsel. In *Edwards* it is significant that the second and pivotal interrogation was preceded by a set of fresh *Miranda* warnings. *Edwards* at 479.

Edwards begins by reviewing *Miranda* and some of its progeny. Perhaps the clearest statement relating to the principle at stake can be found in *Edwards, supra,* at 485.

> *Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." (Citations omitted) Our later cases have not abandoned that view. In *Michigan v. Mosley,* 423 U.S. 96, 46 L.Ed.2d 313, 96 S.Ct. 321 (1975), the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogations cease until an attorney was present only if the individual stated that he wanted counsel. (Citations omitted) In *Fare vs. Michael C., supra,*

> at 719, 61 L.Ed.2d 197, 99 S.Ct. 2560, the Court referred to *Miranda's* "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And just last term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the "undisputed right" under *Miranda* to remain silent and to be free of interrogation "until he had consulted with a lawyer." *Rhode Island v. Enis*, 446 U.S. 291, 298, 64 L.Ed.2d 297, 100 S.Ct. 1682 (1980). We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

Edwards did not establish a new constitutional rule of criminal procedure, such as *Miranda* did. Instead, *Edwards* simply is an example of the application of *Miranda* to a certain discrete fact pattern. If *Edwards* created a per se rule of any sort, it is only that a valid waiver of a request for counsel will not be presumed merely because incriminating statements are elicited at a second interrogation even though preceded by fresh *Miranda* rights. It appears in *Oregon v. Bradshaw*, 103 S.Ct. 2830 (1983), that a majority of this Court viewed *Edwards* as having created a type of per se rule. However, we believe that it is so clearly built upon the holding of *Miranda, supra*, that it is not the sort of rule which should be given anything other than full retroactive application (See part III of this argument).

In *People v. Paintman*, 315 N.W.2d 418 (Mich. 1982), Cert. den. 73 L.Ed.2d 1292, the Michigan Supreme Court had occasion to consider the implications of *Edwards v. Arizona, supra*. In that case the Michigan Supreme Court expressed the view that *Edwards* did not announce a new

the "knowing and intelligent relinquishment or abandonment of a known right or privilege," see *Edwards, supra* at 482, it is clear that the District Court did not engage in a discrete inquiry in that regard. (Joint Appendix 71-72) Furthermore, constitutional standard in these words:

> The Edwards Court took pains to establish that it was not announcing new law, but only clarifying further the dictates of existing law.
>
> "Because the use of Edwards' confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments as construed in *Miranda v. Arizona, supra,* we reverse the judgment * * *." (Emphasis added.) *Edwards,* 451 U.S. at 480, 101 S.Ct. at 1882.
>
> The Court later recited a parade of cases that supported the proposition of *Miranda* that "the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present' ".
>
> The Court concluded the discussion by noting that "[w]e reconfirm these views and to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel". Id., 485, 101 S.Ct. at 1885.
>
> *People v. Paintman, supra,* at 422.

It seems clear that the pattern of interrogation in this case was wholly at odds with the plain teaching of *Miranda,* and that no valid waiver of the right to counsel occurred here. It can at least be said in *Edwards* that fresh *Miranda* rights were given; in this case, no such admonitions were given before the second phase of interrogation, at which the first incriminating statement was allegedly made.

The District Court in this matter misapprehended the stan-

dard for considering whether an individual has validly waived the right to counsel. The District Court in its opinion held that the statements given "were voluntary and not the product of coercion." While the District Court cited cases establishing to the extent that the District Court reviewed the totality of the circumstances, many of its factual conclusions seem at best "strained." (Joint Appendix 68-71) Even the Eight Circuit took pains to respectfully disagree with the District Court on the facts.

In the view of the respondent one need not reach the question of whether *Edwards* should be applied retroactively. *Edwards* did not create a new constitutional rule of criminal procedure. Further, one need not rely on *Edwards* to uphold the decision of the Eighth Circuit in the court below. The important distinction between *Edwards* and this case is that here the second interrogation was not preceded by fresh *Miranda* warnings.

The following quotation from *People v. Paintman, supra,* at 422, eloquently states the situation:

> Of what significance is invocation of a cherished constitutional right if it is ignored by the hearer and, in fact, only seems to exacerbate the defendant's plight? As the time gap increases between the embracing of the right and its fulfillment, the certainty of its existence must surely dim.
>
> *Miranda* becomes meaningless rhetoric in the face of a request for counsel that matures only in form but not in substance.
>
> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." *Miranda,* 384 U.S. at 476, 86 S.Ct. at 1629.

III.

EDWARDS V. ARIZONA SHOULD BE APPLIED IN THIS CASE.

The point has already been made in this brief that *Miranda, supra,* itself established the correct police response to a request for counsel. That response should be the cessation of all interrogation. *Miranda, supra,* at 474. That response should preclude further interrogation until counsel has been made available to the suspect.

We respectfully submit that there is *no* sensible argument that can be made to support the contention that the police interrogation in this case was consistent with *Miranda, supra.* It seems so obvious that we hestiate to put to paper the observation that the police in this case appear to have flagrantly ignored the crystal clear teachings of *Miranda, supra.*

In *Brown v. Louisiana,* 447 U.S. 323 (1980), the Court indicated that three factors would be considered in deciding whether to give retroactive application to a new constitutional doctrine. The factors are: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Brown, supra* at 328.

It seems clear that *Edwards v. Arizona, supra,* directly affects the right counsel. Furthermore, the right to counsel may well be crucial to an accused ultimately receiving a fair trial. *See, e.g. Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). To paraphrase from *Brown, supra,* the right to counsel "is a fundamental right, essential for preventing miscarriages of

justice and for assuring that fair trials are provided for all defendants." *Brown, supra,* at 330.

Respondent believes the state in this matter cannot rationally argue that a consideration of the second factor weighs in favor of the state's position. The same can be said of the third factor. To argue that the retroactive application of *Edwards, supra,* either in general or on same basis in this case, would adversely affect the administration of justice in a substantial way is to acknowledge widespread police conduct at odds with *Miranda.* To view the matter another way, had the detectives in this case followed the "old standard," *Miranda,* and refrained from a second interrogation without benefit of advice of *Miranda* rights, and a second and third interrogation without honoring a plea for counsel, in all likelihood we would not be in court today. Not only did the detectives not rely on the "old standard," they ignored it, just as they ignored the repeated request by respondent that he be free from interrogation until he had consulted with his retained attorney.

The discussion previously in this brief regarding *People v. Paintman, supra,* is applicable also at this point, as in *Paintman* the Michigan Court found it unnecessary to apply traditional retroactivity principles to *Edwards.*

Respondent believes that the facts in this case mandate the application of *Edwards, supra.* To do otherwise is to give a stamp of approval to conduct such as occurred in this interrogation.

The respondent in this case did not initiate the second interrogation session. There is no serious dispute about that. The respondent did not initiate the third interrogation in the police car. There is no serious dispute about that. The petitioner does claim that when respondent is alleged to have said, "taking a human life is so useless," he initiated further

conversation with the police. The Eighth Circuit did not agree, viewing the entire day in the car as a single session. We submit such was a correct decision.

It is therefore plain that under *Edwards, supra,* the alleged incriminating statements must be held to be inadmissible. Viewed in one way, it can be argued that the application of *Edwards* to this case demonstrates the possible futility of focusing on the "initiation" question, at all. Here we had a situation in which the dtectives by the nature of the situation were going to spend several uninterrupted hours with the suspect. Unless no one is to speak at all, it is obvious that "conversation" will occur which seen in isolation may be said to have been "initiated" by one party or the other. But that analysis does not seem very helpful. It may be more useful to see which party initiated the overall setting in which the alleged conversations occurred. In this case there is no doubt but that each session was sought and initiated by the police, not by the respondent. This was not a situation in which a suspect sought out the detectives in order to make a statement. Instead, it is a situation in which the detectives doggedly pursued a course of interrogation over two days and many hours, having turned a deaf ear to a specific request for counsel. No valid waiver occured in this case.

CONCLUSION

The second phase of the interrogation violated *Miranda* for at least two reasons: respondent's request to consult his attorney was not honored, and no fresh *Miranda* warnings were given. The District court so held. It was this interrogation which allegedly resulted in the first incriminating statement.

The third phase of interrogation was also unlawful because of non-compliance with respondent's request to consult his retained attorney, and because this phase was built upon and depended for its foundation on the incriminating statement allegedly obtained in the unlawful second interrogation.

Respondent believes that this court can affirm the court below without deciding if *Edwards, supra,* is to be applied retroactively, on the basis of *Miranda,* and those cases which followed it. If, however, the application of *Edwards* is necessary in order to affirm the Eighth Circuit, respondent believes *Edwards* does not create a new constitutional rule of criminal procedure, and therefore the question of retroactivity need not be addressed.

Should the court hold that the retroactivity question must be addressed, respondent believes retroactive application of *Edwards* is called for in this case because the police conduct was so plainly and substantially at variance with the clear dictates of *Miranda* itself. The detectives paid only "lip-service" to the rights guaranteed by the holding of *Miranda.* They said one thing (you have the right to consult your attorney), and did another.

The respondent respectfully requests that the decision below be affirmed, and that the District Court be directed to forthwith order the release of respondent. In the alternative, should the court hold that the Eighth Circuit cannot be

affirmed, respondent respectfully requests that the matter be remanded for further proceedings to consider whether the result of the unlawful second interrogation tainted the third interrogation.

Respectfully Submitted,

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CLERK

NO. 81-2149

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

NORMAN STUMES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENTS AND AUTHORITIES	1
I. RESPONDENT'S CONSTITUTIONAL RIGHTS UNDER MIRANDA AND EDWARDS WERE NOT VIOLATED BY THE INTERROGATION WHICH OCCURRED IN THIS CASE.	1
II. RETROACTIVE APPLICATION OF A NEW STANDARD OF CRIMINAL PROCEDURE IS NOT REQUIRED BY THE UNITED STATES CONSTITUTION.	15
III. RESPONDENT DID NOT SUFFER ANY DEPRIVATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AS THAT RIGHT DID NOT ATTACH PRIOR TO THE INCRIMINATING STATEMENTS MADE BY RESPONDENT.	22
CONCLUSION	26

TABLE OF AUTHORITIES

CASES:	PAGE
Brewer v. Williams, 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)	22
Brown v. Louisana, 447 U.S. 323, 327, 328, 329, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980)	17
Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966)	16
Edwards v. Arizona, 451 U.S. 477, 483, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378, 387 n. 9 (1981)	2
Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)	6
Johnson v. New Jersey, 384 U.S. 719, 731 (1966)	16
Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)	15
Kirby v. Illinois, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972)	23
Miranda v. Arizona, 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694, 726 (1966)	5
Mosley v. Michigan, 423 U.S. 96, 102, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)	7

Oregon v. Bradshaw, ___ U.S. ___, 103 S.Ct. 2830, 2834, 2835, 77 L.Ed.2d 405 (1983) 2

Rhode Island v. Innis, 446 U.S. 291, 300 n. 4, 302, 303, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) 23

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) 7

OTHER REFERENCES:

28 U.S.C. § 2254 28

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South Dakota State Penitentiary,

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ARGUMENTS AND AUTHORITIES

I

RESPONDENT'S CONSTITUTIONAL RIGHTS UNDER MIRANDA AND EDWARDS WERE NOT VIOLATED BY THE INTERROGATION WHICH OCCURRED IN THIS CASE.

Although a "totality of circumstances" approach was applied by the court of appeals to the questioning of the Respondent, Norman

Stumes, that court divided his interrogation into four sections. Viewed individually or together it is clear that the interrogation conducted in this case did not violate Stumes' constitutional rights under Miranda or its progeny, including Edwards v. Arizona, 451 U.S. 477 (1981) and Oregon v. Bradshaw, 103 S.Ct. 2830 (1983).

After Stumes had fled South Dakota and been apprehended in Green Bay, Wisconsin, he was questioned by Sioux Falls, South Dakota Police Department detectives who had traveled to Green Bay to transport Stumes back to Sioux Falls. The first session occurred on the morning of October 1, 1973. Stumes was given his Miranda rights, agreed to talk with police, and made no statements implicating himself in the Hoff killing. In response to Detective Green's question regarding whether Stumes would be willing to take a polygraph examination, Stumes indicated that he felt

that he should talk with his Sioux Falls attorney before deciding whether to take the polygraph test. Trial Transcript 461. Questioning ceased at that time.

Later in the afternoon of October 1, 1973, approximately five hours after the conclusion of morning interrogation, Detectives Skadsen and Green returned to the Brown County, Wisconsin, Sheriff's Department to question Stumes. No Miranda warnings were given to the Respondent at that time. In response to a question from Detective Green, Stumes indicated that Joyce Hoff's death was accidental. Trial Transcript 35.

The following morning, October 2, 1973, shortly after Stumes, Detectives Skadsen and Green, and a Minnehaha County, South Dakota, Deputy Sheriff had begun the return trip to Sioux Falls by automobile, Stumes was once again given his Miranda rights. He indicated

that he understood them and agreed to talk about the Hoff homicide. Later that afternoon, when the group was about 90 miles from Sioux Falls, Stumes broke down and stated that he "couldn't understand why anybody would want to kill Joyce, and that the taking of a human life is so useless." Trial Transcript 625. After Detective Green had advised Stumes that he would "feel better if he got it off his chest," (Trial Transcript 42), Stumes related how he strangled Joyce Hoff. Id. Stumes also told the officers that he would provide a full statement when they arrived in Sioux Falls. Trial Transcript 44.

After arrival in Sioux Falls at approximately 6:45 p.m. on the evening of October 2, 1973, Stumes was placed in the Minnehaha County jail. Shortly thereafter, Stumes asked to see Detective Skadsen. Skadsen came to Stumes' cell and, according to Skadsen:

> "He [Stumes] was crying again, and he put his head on my shoulder, and he said 'please tell them that I didn't mean to kill her, that it was an accident--that I am not a vicious killer.'

Trial Transcript 547.

Miranda v. Arizona, 384 U.S. 436 (1966), provided standards for police conducting custodial interrogations of criminal suspects. While Miranda instructed the police that interrogation must cease when a suspect requests an attorney, and not resume until a lawyer is present, that decision did not prohibit all questioning subsequent to the request of an attorney. The prosecution must meet its "heavy burden" of demonstrating that an accused voluntarily, knowingly, and intelligently waived his right to counsel in order to introduce a confession made in the absence of counsel. Statements volunteered by a suspect are admissible. Miranda, 384 U.S. 478. Whether a suspect waived his

rights must be examined in light of the totality of the circumstances, which includes the accused's background, experience and age. Fare v. Michael C., 442 U.S. 707, 725 (1979). The State met its burden under the Miranda standard, as well as under the new constitutional doctrine of Edwards and Bradshaw.

Stumes was given his Miranda warnings when he was arrested by Wisconsin authorities. Prior to the first questioning session he was again given his rights and he agreed to talk. Stumes indicated his understanding of his constitutional rights by stating that he wanted to speak with his Sioux Falls attorney before deciding whether to take a polygraph examination. When Detectives Skadsen and Green returned to question Stumes on the afternoon of October 1, he indicated, after responding to some of their questioning, that he wanted to consult with an attorney. On both occasions Stumes' right

to terminate questioning was "scrupulously honored." See Mosley v. Michigan, 423 U.S. 96, 102 (1975).

During the questioning session of the afternoon of October 1, 1973, Stumes indicated that Joyce Hoff's death had been accidental. Trial Transcript 35. Stumes, in his brief, attempts to exaggerate the importance of his statement. While the "accidental" comment was Stumes' first indication that he was involved in the Hoff killing, that statement did not compel him to confess the following day on the trip to Sioux Falls. Stumes advances a "fruit of the poisonous tree" argument, see Wong Sun v. United States, 371 U.S. 471 (1963), claiming that but for the interrogation which produced the "accidental" statement of October 1, he would not have confessed the following day. That argument has little merit.

Stumes' claim that Hoff's death was accidental indicated not only his knowledge of the manner in which she died, but also served as a denial of criminal responsibility for her death. The confession given by Stumes during the automobile trip, in which he stated that he strangled Hoff, stands as a repudiation of his earlier statement that her death was accidental and was an admission of his guilt. Viewed in this light, Stumes' "accidental" statement of October 1 cannot be seen as the cause of his confession on the following day. His statement of October 2 was a full confession, not an attempt to explain how Hoff's death might have accidentally occurred. It simply does not follow that a confession admitting guilt must result from a statement denying criminal responsibility. As the District Court found, Stumes' "accidental" admission was harmless.

The confession that Stumes made during the automobile trip and his later statement at the Minnehaha County jail that he wasn't a "vicious killer," were not obtained in violation of his constitutional rights. A brief review of the circumstances demonstrates the voluntary nature of both statements.

Stumes was given his Miranda warnings shortly after the return trip to Sioux Falls had begun. He indicated his willingness to talk about the Hoff homicide. The trip was uneventful until about 90 miles outside of Sioux Falls when Stumes suffered his "little conflict with [his] emotions" and remarked that he "couldn't understand why anybody would want to kill Joyce, and that the taking of a human life is so useless." Trial Transcript 625. Detective Green, as mentioned above, then advised Stumes that he would "feel better after he got this off his chest."

Trial Transcript 42. Stumes then told the officers how Joyce Hoff died. Id. When Green admonished Stumes that his attorney wouldn't want him to make a statement, as Stumes promised to do upon arrival in Sioux Falls, Stumes indicated his unwillingness to follow his attorney's advice, stating that "he didn't give a damn what his attorney said; he could talk to anybody he wanted to." Trial Transcript 44.

It is significant that Stumes was not being interrogated when he confessed. In fact, according to his own testimony, there had been no conversation of any kind in the car for 10 to 15 minutes before he began to talk. Trial Transcript 626. In fact, Stumes testified at trial that there had been no direct interrogation during the trip and that, during the afternoon of the trip, there was "general conversation." Trial Transcript 624, 625. The situation was so relaxed that,

according to Stumes, Detective Skadsen was "just about asleep in the front seat." Trial Transcript 626. This was hardly a situation in which relentless interrogators engaged in third degree tactics to coerce a confession from a terrified suspect.

Applying the test of Oregon v. Bradshaw, it is clear that Stumes' admissions were not secured in violation of the Constitution. First, Stumes had been given his Miranda rights shortly after the trip began. He indicated that he understood his rights and was willing to talk. When Stumes finally had his "little conflict with his emotions" and confessed, he clearly initiated a further conversation with police within the strictures of Bradshaw. It bears repeating that there had been no conversation in the car for at least 10 minutes before Stumes spoke. And his statements clearly indicated his desire for a generalized discussion of the crime and

its investigation. The second part of the Bradshaw test, determining whether Stumes waived his Fifth Amendment rights was also satisfied. An examination of the particular facts and circumstances surrounding his admissions indicates that Stumes voluntarily waived his rights. As the District Court pointed out, Stumes was not a novice in dealing with the court system and law enforcement, as he had been previously involved in both civil and criminal matters. He had been given his Miranda rights not only on the morning of his confession, but also the day before and when he was arrested in Green Bay. Stumes had indicated his understanding of those rights by terminating the Detectives' questioning at both the morning and afternoon sessions on October 1. He was not coerced in any manner to confess and spoke voluntarily, even stating, according to Detective Green, that "he [Stumes] wanted to tell somebody

about it but he just didn't know how to go about it." Trial Transcript 478. In addition, after having said that he would give a statement when they arrived in Sioux Falls, and being told by Detective Green that his attorney would advise Stumes against giving such a statement, Stumes indicated his unwillingness to follow his attorney's instructions. Stumes' waiver of his constitutional rights to remain silent and to counsel was knowing, intelligent and voluntary.

After Stumes had been placed in his cell at the Minnehaha County jail in Sioux Falls, he asked to see Detective Skadsen. When Skadsen came to his cell, Stumes was crying and told Skadsen that he "didn't mean to kill her" and that he was not a vicious killer. Trial Transcript 547.

Applying the Edwards-Bradshaw criteria, it is clear that Stumes initiated the above

jailhouse exchange and that his admission was directed towards a generalized discussion of the crime and its investigation. Once again, as he did when he confessed during the trip, Stumes effectively waived his constitutional rights. He was not under interrogation while in the jail and Detective Skadsen came to his cell at Stumes' request. Stumes knowingly, intelligently and voluntarily surrendered his rights when he spoke with Detective Skadsen.

In sum, Stumes simply countermanded his decision not to talk with the police when he confessed on October 2. Under the line of cases beginning with Miranda, he was free to change his mind and talk with law enforcement officers.

Finally, it is instructive that the Sioux Falls attorney who was initially retained by Stumes' mother to represent her son felt that the police had not engaged in unlawful conduct:

> "I didn't have any agreement with the police department with respect to questioning him. I only had an agreement--the only agreement I had was with respect that they contact me if they found him before I did. They kept their part of the obligation, as far as I was concerned, in that respect." [Testimony of Steve Jorgenson, District Court Evidentiary Hearing, October 6, 1977, at 25.]

II

RETROACTIVE APPLICATION OF A NEW STANDARD OF CRIMINAL PROCEDURE IS NOT REQUIRED BY THE UNITED STATES CONSTITUTION.

As Petitioner stated in his initial brief, this Court's decision in Edwards v. Arizona represents more than simply an amplification of Miranda. The "totality of circumstances" approach has been utilized since Johnson v. Zerbst, 304 U.S. 458 (1938), to determine whether an accused has waived a constitutional right. However, in Edwards, this Court grafted a new requirement onto the Miranda teachings, the necessity that the suspect "initiate" further conversation with

the police once he has invoked his constitutional rights. The focus on initiation of police-suspect contacts is not the result of a predictable evolution of Miranda. As this Court has held on many occasions that Miranda is not retroactive, see, e.g., Johnson v. New Jersey, 384 U.S. 719 (1966); Davis v. North Carolina, 384 U.S. 737 (1966), so should you hold as regards Edwards. The Edwards decision has effected substantial change in the standards guiding custodial interrogation. Police must be weary of the slightest indication by a suspect that he desires to terminate questioning. A casual inquiry as to whether a suspect desired to resume speaking with police after he had invoked his right to silence and requested counsel could be construed as an "initiation" of conversation by the police, and subsequent admissions subject to suppression under a strict reading of Edwards. Such emphasis on

who initiated an exchange between a suspect and his interrogators had not been the primary focus of the Miranda line of cases prior to Edwards. The Edwards-Bradshaw test has elevated the issue of who initiated a conversation to a central position in the determination of waiver of Fifth Amendment rights. This militates against retroactive application of Edwards as law enforcement officers had been relying upon pre-Edwards standards.

Retroactive application of a new constitutional standard is determined by application of three criteria: the rule's purpose, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. Brown v. Louisana, 447 U.S. 323, 328 (1980). The purpose of the new rule

is the most important of the above criteria. Id. A rule which corrects any aspect of a criminal trial which impairs its truth-finding function and raises questions about the accuracy of guilty verdicts is to be given retroactive effect. Id.

As Petitioner demonstrated in his initial brief, application of the Brown criteria militates against retroactive application of Edwards. The extent of police reliance on pre-Edwards standards has been discussed above and will not be repeated here. The other concerns which are determinative of Edwards' retroactive application will be discussed briefly.

The paramount concern, of course, is the purpose of the new constitutional rule. The purpose of those cases, beginning with Miranda, that deal with custodial interrogation is to insure that the suspect is able to

effectively exercise his constitutional rights to remain silent and to counsel. The setting of limits on police conduct in a custodial interrogation setting enables a suspect to exercise his rights. These concerns, however, do not directly implicate a trial's truth-finding function nor do they affect reliability of guilty verdicts.

A guilty person's confession, obtained by police conduct in violation of the accused's Fifth Amendment rights, would be excluded from use at his trial. Although the confession is accurate, the determination of truth and the reliability of verdicts are subordinated under the Fifth Amendment to the considerations noted above: insuring an opportunity for the effective exercise of his constitutional rights by an in-custody suspect subject to questioning and curbing overzealous police interrogation. Applying Edwards retroactively will not improve the

truth-finding process at trial nor the reliability of verdicts. Edwards, as the other Fifth Amendment cases preceding it, is concerned with pretrial custodial interrogation. There is simply no need for retroactive imposition of the Fifth Amendment's exclusionary rule. To do so in this case would require the exclusion of Stumes' accurate and trustworthy admissions.

The retroactive application of Edwards would have a devastating effect on the administration of justice. Imposing the Edwards standards retroactively could require the retrial of many convicted felons whose convictions became final long ago. The result may be that many criminals, justly convicted, will be retried, but prosecutors will be prohibited from using otherwise trustworthy confessions. If other evidence is insufficient, or, because of the passage of time,

unavailable, then guilty individuals may walk free. This case illustrates that point well.

Stumes killed Joyce Hoff ten years ago. He testified at trial that he went to her apartment in the late night hours of September 16, 1973, had sexual intercourse with her, and remained in her apartment until the following morning. Trial Transcript 604-614. Hair found on the victim's body was identified as matching hairs taken from Stumes. Trial Transcript 354-356. If Stumes must be retried without benefit of his admissions and trial testimony, it being rather unlikely that he would chose to testify at his retrial, the final result may well be the acquittal of a killer. Discovering an evidentiary substitute for Stumes' confessions will be a difficult, probably impossible task.

As noted above, this crime occurred ten years ago. Retrying Stumes now will require

trying to relocate witnesses who may have moved away or perhaps even died. Even those who can be located will have to try to remember the events of a decade ago.

III

RESPONDENT DID NOT SUFFER ANY DEPRIVATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AS THAT RIGHT DID NOT ATTACH PRIOR TO THE INCRIMINATING STATEMENTS MADE BY RESPONDENT.

While the District Court found that Stumes has suffered no violation of his Sixth Amendment right to counsel and the Eighth Circuit Court of Appeals chose not to deal with the issue, Respondent has implicitly raised the Sixth Amendment claim in this Court by setting forth the language of the Sixth Amendment in his brief and comparing the automobile trip in this case to that taken by the respondent in Brewer v. Williams, 430 U.S. 387 (1977). Accordingly, Petitioner will briefly address Stumes' Sixth Amendment claim.

The Sixth Amendment right to counsel attaches only "after the initiation of adversary judicial criminal proceedings--whether by way of formal charges, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972) (Stewart, J., plurality opinion); Brewer v. Williams, 430 U.S. 387, 398 (1977). The Sixth Amendment prohibits the police from "eliciting incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed." Rhode Island v. Innis, 446 U.S. 291, 300, n. 4 (1980).

Analyzed in light of the above cases, it is clear that Stumes' Sixth Amendment claim has no merit. Stumes' arrest and confinement in Green Bay were a result of other criminal charges pending against him and his status as a suspect in the Hoff homicide. However, no

"adversary judicial proceedings" had been commenced against him in connection with the killing. Stumes was not formally charged with murder until after his return to Sioux Falls. His Sixth Amendment right to counsel, therefore, was not violated by the questioning which took place on October 1 and October 2, 1973. Stumes also contends, apparently, that his Sixth Amendment rights were violated by the conversations which took place among the detectives and himself during the trip back to Sioux Falls on October 2, 1973. He compares that trip with the one taken by the respondent in Brewer v. Williams. There are two obvious differences between the situation in Brewer and that in this case. First, the police in Brewer tried to psychologically coerce Williams, an escaped mental patient who was deeply religious, by reciting a "Christian burial speech" designed to induce

Williams to say where he had hidden the body of the ten-year old girl whom he had abducted. The conduct of detectives Skadsen and Green in this case does not approach the transgressions of the officers in Brewer. Secondly, and most importantly from the viewpoint of the Sixth Amendment's right to counsel, Williams had been arraigned in Davenport, Iowa, on the arrest warrant, charging him with abduction of the girl, before beginning the return trip to Des Moines. "Adversary judicial proceedings" had begun prior to the trip. In this case, no arraignment or other adversary judicial proceeding related to the Hoff homicide had been commenced before Stumes was transported back to Sioux Falls. The District Court was correct in finding that Stumes suffered no Sixth Amendment deprivations as his rights under that constitutional provision had not attached relative to the Hoff killing.

CONCLUSION

This case illustrates how the trial is being relegated to a position of secondary importance in our criminal justice system. The determination of an accused's guilt or innocence should be the focal point of that system. Yet the trial has become only the first skirmish in what appears to be the criminal justice system's version of the Hundred Years War. Stumes was convicted nearly ten years ago, the time for direct appeal and seeking certiorari have long passed. However, by utilizing habeas corpus procedures and the appellate process, Stumes has been able to challenge his "final" conviction for almost a decade. Petitioner does not argue with the availability of federal post-conviction remedies necessary to cure the constitutional defects of state trials and judgments. Petitioner only urges this

Court to consider fully the effects of requiring the retroactive application of Edwards. In this case, at least, retroactive application of Edwards may result in the injustice of a convicted killer regaining his freedom. To serve law at the expense of justice benefits neither our legal system nor society. In fact, it is only society that is punished when otherwise truthful confessions are excluded. The putative unconstitutional conduct of the police is not cured nor is an innocent person set free. The opposite occurs: justice is denied and the guilty regain their freedom.

Based on the foregoing arguments and authorities, and on the arguments and authorities presented in his initial brief, the Petitioner respectfully requests that this Court reverse the decision of the Eighth

Circuit Court of Appeals and find that Respondent is not entitled to habeas corpus relief under 28 U.S.C. § 2254.

Respectfully submitted,

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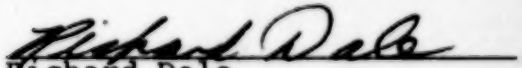

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No. 81-2149-CFH
Status: GRANTED

Title: Herman Solem, Warden, Petitioner
v.
Norman Stumes

Docketed:
April 30, 1982

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Meierhenry, Mark V.

Counsel for respondent: McGreevy, Timothy J.

Entry	Date	Note	Proceedings and Orders
1	Apr 30 1982	G	Petition for writ of certiorari filed.
2	May 28 1982	G	Motion of respondent for leave to proceed in forma pauperis filed.
3	May 28 1982		Brief of respondent Norman Stumes in opposition filed.
4	Jun 2 1982		DISTRIBUTED. June 17, 1982
6	Jun 21 1982		REDISTRIBUTED. June 24, 1982
7	Jun 30 1982		DISTRIBUTED. September 27, 1982
10	Oct 25 1982		REDISTRIBUTED. October 29, 1982
11	Jun 28 1983		DISTRIBUTED. June 29, 1983
12	Jul 6 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
14	Jul 6 1983		Petition GRANTED. limited to Question 3 presented by the petition.
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15	Jul 18 1983	G	Motion of respondent for appointment of counsel filed.
16	Jul 20 1983		DISTRIBUTED. Sept. 26, 1983. (Motion of respondent for appointment of counsel).
17	Aug 22 1983		Brief of petitioner Solem, Warden filed.
18	Aug 22 1983		Joint appendix filed.
19	Oct 3 1983		Motion for appointment of counsel GRANTED and it is ordered that Timothy J. McGreevy, Esquire, of Sioux Falls, South Dakota, is appointed to serve as counsel for the respondent in this case.
21	Sep 28 1983		Order extending time to file brief of respondent on the merits until October 6, 1983.
22	Oct 11 1983		Brief of respondent Norman Stumes filed.
23	Oct 24 1983		SET FOR ARGUMENT. Monday, November 28, 1983. (3rd case) (1 hour)
24	Oct 31 1983		Record filed.
25	Oct 31 1983		Certified original record & C.A. proceedings, 5 volumes received.
26	Nov 2 1983		CIRCULATED.
27	Nov 18 1983	X	Reply brief of petitioner Solem, Warden filed.
28	Nov 21 1983		Record filed.
29	Nov 21 1983		Certified trial transcripts received. (Box).
30	Nov 28 1983		ARGUED.